The Implied Undertaking in Discovery

By Craig Gillespie and Bottom Line Research[1]

In common law, there is an implied undertaking on litigants not to use information obtained during the discovery process for purposes unrelated to the proceeding. This implied undertaking rule applies to parties, their counsel and all persons.[2]

This implied undertaking continues, even where a case is settled and the discovery evidence is not used. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. Only when "...an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial is the undertaking spent, but not otherwise, except by consent or court order.[3]"

Recently the Supreme Court of Canada had occasion to consider the application of this rule in detail in *Doucette (Litigation Guardian of) v. Wee Watch Day care Systems Inc*.[4]. The matter initially arose in British Columbia. A civil action was brought against a childcare worker by the parents of a child who was injured while under that worker's care. A criminal investigation against the same childcare worker relating to charges of child abuse was pending.

The Attorney General of B.C. and the Vancouver Police sought to obtain the discovery transcripts from the civil action, to be used in support of their criminal investigation. Their application in Chambers was not successful. On appeal, the decision was reversed and the court allowed the transcript to be released. The unanimous Supreme Court of Canada reversed the decision of the B.C. Court of Appeal. Per Binnie J.:

> **20** The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the

> opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.

Binnie J. went on to discuss at length the rationale of the rule. The first rationale he considered relates to privacy interests:

> 24 ...pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine..... [thus by] issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.
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> 25 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. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. **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 judicial order.** (Emphasis added.)

Binnie J. provided a second rationale for the rule – that it exists for the purpose of ensuring a more complete and candid discovery:

> **26** .... A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by

> avalanche") as often to preclude careful pre-screening by the individuals or corporations making production....
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> **27** For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).

Binnie J. cites a plethora of cases considering the application of the rule.[5]

Notwithstanding that the general rule that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order, the Supreme Court in *Doucette* notes that exceptional circumstances can trump the implied undertaking. Binnie J. provided some guidance as to how the rule can be circumvented:

> **30** The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:
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> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
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> In such an application the judge would have access to the documents or transcripts at issue (S.C.J.).

Binnie J. cautioned that "...delay will defeat the purpose of the application. It is important that [applicants] proceed expeditiously[6]" Furthermore, when making such an application it is incumbent on the applicant "...to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.[7]"

Reiterating this test later on in the judgment, Binnie J. emphasized that it was the Court's intention to retain some degree of flexibility in assessing such applications:

> **38** ...the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

Applying the aforesaid principles to the particular case at bar, Binnie J. stressed the importance of balancing the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself - "...in this case that factor was decisive" although in "..other cases the mix of competing values may be different". The key in each case, he said "...is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the [implied] undertaking will not achieve its intended purpose.[8]"

Binnie J. expressly distinguished the Canadian approach from the English approach. The approach taken by the House of Lords as enunciated in *Crest Homes plc v. Marks*[9] found that there was:

> ...no general principle beyond this, that 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. 1083) (para. 33 S.C.J.).

As to the Canadian approach, Binnie J. speaking for the Supreme Court preferred instead:

> ...to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice

> process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455, a case referred to in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.[10]

Binnie J. next provided guidance as to how courts ought to exercise their discretion when considering an application to release discovery documents. 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.[11]"

The focus of the Court in *Doucette* then shifted to consider cases in which the implied undertaking rule at common law (and in those jurisdictions which have enacted rules, more or less codifying the common law) would be subject to various sorts of exceptions such as legislative override[12], or in cases where there is a public safety concern[13] or in cases where it becomes necessary to impeach inconsistent testimony.[14]

The "crimes" exception is discussed at length by Binnie J.[15] Of note is the distinction Binnie J. draws between implied undertakings and privilege, and the distinction between having a right to access records and the right to use them for a particular purpose:

> **56** The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy*

> *Clinic* (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available [and which the court suggest is the proper way to access discovery evidence having criminal implications or alternatively through a subpoena *duces tecum*], only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

The reasoning of the Supreme Court was in line with an earlier ruling of an Alberta court in *Schreiber v. Canada (Attorney General)*[16] [hereinafter *Schreiber*]. Schrieber was seeking to use information obtained during discoveries that were related to proceedings to have him extradited to Ontario, in a different set of proceedings.

Schrieber's argument was that he intended to use evidence obtained during discoveries for certain specific limited purposes. (Those purposes included providing the evidence to Swiss Authorities so they could determine whether the RCMP should be prosecuted, and to use the evidence in support of Schreiber's separate, but inter-related legal challenges. These challenges included a challenge to the constitutional validity of parts of the *Extradition Act*, and a challenge as to the impartiality of Canada's Minister of Justice to assess the extradition request, given what had been disclosed at the discoveries.)

The court concluded that Schreiber's interest in using the discovery information outweighed the interests that the implied undertaking was meant to address. These interests related to the privacy interests of the parties and were meant to provide a counterbalance to the intrusiveness of the discovery process. The information Schreiber was seeking to utilize was not related to a privacy interest "in the usual sense". Here, the information concerned the conduct of public officials in the exercise of their public duties, and this did not engage anyone's privilege against self incrimination. Furthermore, Schreiber intended to use the information only in proceedings to which the Department of Justice would be a party.

More recently in *Engel v. Dehid*[17] Moen J. applied Binnie J.'s reasoning to a case in which there was a civil action by the plaintiff against a police officer, and related

disciplinary proceedings against the same police officer. The lawyer acting for the police officer in the disciplinary proceedings applied to the Court for an Order directing release of the discovery transcripts and materials arising from the civil action, to be used for a variety of purposes as set out in the application. The plaintiff objected on the basis of his privacy interests being violated. Moen J. held that the disciplinary proceedings involved the same or similar parties and the same or similar issues. Therefore, the prejudice to the examinee was virtually non-existent. In reaching this conclusion Moen J. relied squarely on the reasoning of Binnie J. in *Doucette*. Moen J. took additional steps to protect the privacy interests of the plaintiff by restricting the use to which the discovery evidence could be put, and by requiring that in specific instances, the evidence would need to be given *in camera.* In the event that such evidence could not be given *in camera* such evidence was not to be disclosed.

A similar result was reached in a case where a physician sought to use evidence obtained from an Examination for Discovery in a civil action (brought against him by the plaintiff), in a separate matter involving the physician's defense against complaints which was brought to the College of Physicians and Surgeons.[18]

> I have no difficulty in concluding that this is one of those situations where an exception should be granted.... I believe that the plaintiff, having instituted the complaints to the College and having instituted this action, both against the same two physicians and both relating to the same issues, cannot now reasonably complain if information in this action is used by the same parties to answer those complaints. ... I do not see that any injustice will be visited on the plaintiff by granting such an order (and none was suggested by her) but, if some injustice could be discerned, it would, in my view, be greatly outweighed by the prejudice to the defendant physicians if an exception was not granted.

The Alberta decision of *Harcap Investments Inc. v. Alberta Permit Pro Inc*.[19] considers at length the common law rule with respect to the implied undertaking. In *Harcap*, the court was asked to determine whether evidence from a discovery transcript from related proceedings could be used in the *Harcap* action. The application was allowed and the transcripts from discovery could be used in another proceeding to refresh the memory of

one of the parties. Harcap was decided before *Doucette*, though arguably the result would likely have been the same had the *Doucette* decision already been rendered.

A breach of the undertaking may amount to contempt of court and does not give rise to damages.[20] The unanimous Supreme Court of Canada in *Doucette* indicated:

> **29** Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.

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[1] **With thanks to Shelly Minarik of Bottom Line Research for her original preparation of this material**.
[2] Cudmore, *Choate on Discovery*, 2nd ed., looseleaf (Toronto: Thomson Carswell, 2008 Release 5) at 2-6.4
[3] *Doucette (Litigation Guardian of) v. Wee Watch Day care Systems Inc*., 2008 CarswellBC 411, 2008 SCC 8,[2008] 1 S.C.R. 157, [2008] S.C.J. No. 8 at para. 51.
[4] 2008 CarswellBC 411, 2008 SCC 8,[2008] 1 S.C.R. 157, [2008] S.C.J. No. 8
[5] Binnie J. also cites with approval "...other decisions which are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96." Also cited with approval is J. B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation - Current Developments and Future Trends*, October 19, 1991), at pp. 36-40 (*Doucette* at para. 28 S.C.J.).
[6] *Doucette* at para. 31.
[7] *Doucette* at para. 32.
[8] *Doucette* at para. 32.
[9] [1987] 2 All E.R. 1074 referred to at para. 33 *Doucette.*
[10] *Doucette* at para. 33.
[11] *Doucette* at para. 35, citing for support *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).
[12] *Doucette* at para. 39.
[13] *Doucette* at para. 40.
[14] *Doucette* at para. 41.

[15] *Doucette* at paras. 42-50.
[16] (2000), 83 Alta. L.R. (3d) 346, [2001] 1 W.W.R. 739 (Q.B.).
[17][2008] A.J. No. 1357, 2008 ABQB 608 (Alta. Q.B.)
[18] *Browne v. McNeilly***,** **[**1999] O.J. No. 1919**,** 99 O.T.C. 326, 41 C.P.C. (4th) 330, 88 A.C.W.S. (3d) 781, aff'd [2000] O.J. No. 1805, 99 A.C.W.S. (3d) 51 (Ont. C.A.).
[19] [2007] A.J. No. 1094, 2007 ABQB 590, 47 C.P.C. (6th) 99, 438 A.R. 202, 162 A.C.W.S. (3d) 215 (Alta. Q.B.).
[20] *Casavant v. Alberta Co-Op Taxi Line Ltd*. (1996), 49 C.P.C. (3d) 115, 41 Alta. L.R. (3d) 425, 188 A.R. 381 (Alta. Master).