The Implied Undertaking Rule

By
Marko Vesely

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THE IMPLIED UNDERTAKING RULE

Introduction

The rule that a party receiving documents in litigation holds them subject to an implied undertaking to use them only in the proceedings in which they were produced has been a fixture of practice in British Columbia since 1995. However, while the rule is easy to state, it often proves more difficult to apply in practice and carries with it the potential for very serious sanctions for breach.

The implied undertaking rule is of English origin, dating back at least as far as the mid 19th century in the decisions of *Williams v. Prince of Wales Life Co.*[1] and *Reynolds v. Godlee.*[2] The rule was made a part of the law of British Columbia by the Court of Appeal's decision in *Hunt v. T&N plc*[3] Prior to the *Hunt* decision, the practice was governed by the Court of Appeal's decision in *Kyuquot Logging Ltd. v. B.C. Forest Products Limited*[4] in which the majority had held that a party obtaining production of documents under the *Rules of Court*, absent an express undertaking or order, was free to use those documents for purposes other than the conduct of the proceedings in which they were produced. A five-judge panel in *Hunt* endorsed the dissenting reasons of Esson J.A. in *Kyuquot Logging*, overruled its earlier decision in that case, and stated the rule as follows:[5]

> Accordingly, we would uphold the obligation which the law has generally imposed upon a party obtaining discovery of documents, and we would require such party, in appropriate cases, to obtain the owner's permission or the court's leave to use the documents other than in the proceedings in which they are produced.

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[1] (1857), 23 Beav. 338

[2] (1858), 4 K. & J. 88

[3] (1995), 4 B.C.L.R. (3d) 110 (C.A.)

[4] (1986), 5 B.C.L.R. (2d) 1 (C.A.)

[5] *Hunt, supra,* at para. 64

The implied undertaking rule has been established as a part of the common law across Canada[6] and in some provinces has been codified as a part of the rules of court.[7] Despite the prevalence and prominence of the implied undertaking rule, interesting questions remain as to its rationale, scope, and implementation in practice. This paper will attempt to explore some of those issues.

Consequences for Breach

It has been long established that the implied undertaking is one given to the court and is accordingly potentially sanctioned by contempt proceedings.[8] The decision in *N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management Corp.*[9] illustrates the seriousness of the implied undertaking rule, particularly for counsel. The plaintiff brought an action seeking damages incurred when an employee of the defendant lowered a bridge onto one of the plaintiff's ships. The plaintiff's lawyer, Marler, read a copy of a document that had been provided by the defendant (an occurrence report) as well as portions of the defendant's examination for discovery evidence to a newspaper reporter, who then published the information. The lawyer stated that he was unaware of the implied undertaking rule. The defendant brought a motion for contempt against the lawyer personally. The motions judge found the lawyer in contempt and ordered him to pay the defendant costs of the motion in the amount of $37,500. This finding was upheld on appeal.

In *Sandbar Construction Ltd. v. Howon Industries Ltd.*,[10] the court confirmed that the implied undertaking is an obligation owed to the court, and that a breach of the rule by counsel can accordingly give rise to contempt proceedings.

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[6] See, e.g., the decision of the Ontario Court of Appeal in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.), handed down less than three months after *Hunt*.

[7] See, e.g., Rule 30.1.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[8] See, e.g., *Alterskye v. Scott*, [1948] 1 All E.R. 469.

[9] (2002), 225 F.C.R. 308, 2002 FCT 1247, aff'd, (2004), 322 N.R. 83, 2004 FCA 210

[10] (1998), 58 B.C.L.R. (3d) 55 (S.C.), at para. 14

Rationale for the Implied Undertaking Rule

Many cases have commented on the rationale underlying the rule. In *Riddick v. Thames Board Mills Ltd.*,[11] for example, Lord Denning M.R. described the rationale in the following terms:[12]

> On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum of 16th April 1969 to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. 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 an ulterior or alien purpose. Otherwise, the courts themselves would be doing injustice.
>
> 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 purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers or for bringing a libel action, or for any other alien purpose.

The fact that the documents are obtained by compulsion appears from this passage to be an animating principle underlying the rule, as do concerns with protecting the privacy interests of litigants and encouraging openness and fairness in the discovery process. Hobhouse J., in *Prudential Assurance Co. v. Fountain Page Ltd.*,[13] underscored the connection between the rule and the element of compulsion underlying document production in litigation. His Lordship held as follows:[14]

> The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given

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[11] [1977] 3 All E.R. 677 (C.A.)

[12] *Ibid.*, at pp. 687-88 (emphasis added)

[13] [1991] 1 W.L.R. 756 (Q.B.)

[14] *Ibid.*, at p. 765

> this power because the invasion of the other party s rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purposes. …

The Ontario Court of Appeal cited *Prudential Assurance* with approval and echoed these concerns in the leading case in that jurisdiction, *Goodman, supra*, which was decided less than three months after *Hunt*. Morden A.C.J.O. stated the following:

> [T]he principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents and intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place.

The Supreme Court of Canada touched on the rationale for the rule in *Lac d'Amiante du Quebec Ltee v. 2858-0702*.[15] Though the case originated from Quebec and involved a consideration of the civil law principles, the Court made the following the comments on the rationale for the rule:[16]

> It appears that the preferred approach is a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible. In return for this freedom to investigate, an implied obligation of confidentiality has emerged in the case law, even in cases where the communication is not the subject of a specific privilege…The aim is to avoid a situation where a party is reluctant to disclose information out of fear that it will be used for other purposes. The aim of this procedure is also to preserve the individual's right to privacy. …

These decisions, and others, would appear to ground the rule in the fact that documents are obtained in litigation by compulsion. However, courts have not sustained this conclusion when the circumstances of the case have truly pressed the issue. *National Gypsum Co. v. Dorrell*[17] was an

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[15] [2001] 2 S.C.R. 743

[16] *Ibid.*, at pp. 771-72 (citations omitted)

[17] (1989), 68 O.R. (2d) 689 (H.C.J.)

unusual case which required the court to consider squarely whether the fact that documents are obtained under compulsion is essential to the application of the rule. The plaintiff sued its former employee, who had resigned and gone to work for the plaintiff's competitor, alleging that he had taken confidential documents when he left. The defendant took the unusual position in the litigation of not requesting documents from the plaintiff; in fact, he resisted being further exposed to the plaintiff's confidential and proprietary documents for fear of more allegations by the plaintiff that he was misusing information contained in those documents. The Master held that, since the defendant was not compelling documents from the plaintiff, any documents that the plaintiff voluntarily chose to produce to the defendant, either on discovery or at trial, would not be subject to an implied undertaking of confidentiality. The Master's logic seemed unassailable, but in a decision that might have pleased Oliver Wendell Holmes,[18] Sutherland J. allowed the plaintiff's appeal and held that the implied undertaking applied. He stated the following:[19]

> I must respectfully disagree with the conclusion that the implied undertaking arises as a promise given to the producing party or given to the court as a term of, or *quid pro quo* for, the obtaining of something which the undertaking party wants. In my view the party against whom the implied undertaking is imposed has no choice or election with respect to the arising of the undertaking. The term "implied undertaking", with its suggestion of a contractual nexus, may be an unfortunate and misleading one. However, the so-called implied undertaking is in reality a rule of judge-made procedural law arising from the inherent jurisdiction of the court to control its own process. … The implied undertaking thus does not arise from any process of negotiation or dickering between the parties. The party upon whom the implied undertaking is imposed cannot prevent the implied undertaking from coming into being by refraining from examination of the productions or by declarations that he has no desire or intention to see the documents. It matters not that the opposite party has no interest in the documents. If the documents are listed in the affidavit on production and are made available, the documents are *prima facie* relevant to an issue in the action and the implied undertaking applies to them. It matters not that the issue to which they are relevant is the producing party's issue. The producing party is not to be put to an election between foregoing the protection of the implied undertaking and, on the other hand, weakening its case

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[18] Who observed that "[t]he life of the law has not been logic; it has been experience."

[19] *National Gypsum, supra,* at p. 697 (emphasis added; citations omitted)

> by withholding confidential documents which it believes are relevant and would be helpful to its case. The implied undertaking is imposed by the Court in the interests of the administration of justice, and to encourage broad discovery and the disclosure of relevant material so that justice may be done.

National Gypsum was cited with approval and applied in this province by Williams C.J.S.C. in *Discovery Enterprises Inc. v. Ebco Industries Ltd.*,[20] in which his Lordship held that the obligation of non-disclosure applied even to documents provided voluntarily in litigation.

What Constitutes a "Use" of a Document Outside the Litigation?

While the implied undertaking rule can be easily and succinctly stated, it is often more difficult to apply in practice. The rule is said to prevent a litigant and its counsel from "using" a document other than in the proceedings in which it was produced, but what does it mean in this respect to "use" a document?

Some cases are relatively straightforward. Where a party receiving a document through discovery in one action commences a subsequent action in defamation based on statements made in the document, the action will typically be stayed as breaching the implied undertaking rule. See, for example, *Riddick, supra*; *Goodman, supra*; and *Sezerman v. Youle.*[21] As the *N.M. Paterson* case demonstrates, providing a copy of a document or relaying information contained in a document to the media will also breach the implied undertaking.

What about "using" a document from one proceeding to impeach the testimony of a witness in another proceeding? The common law in Ontario appeared to permit this use of a document,[22] and this exception has since been codified in Rule 30.1.01(6) of the Ontario *Rules of Civil Procedure*. The law in British Columbia does not seem to have recognized a similar automatic exemption, as

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[20] (1997), 42 B.C.L.R. (3d) 192 (S.C.) at para. 13-16

[21] (1996), 135 D.L.R. (4th) 266 (N.S.C.A.)

[22] *Goodman, supra,* at p. 375 (though these comments were made in *obiter*)

demonstrated by applications in this jurisdiction seeking leave of the court to use documents and discovery transcripts from one proceeding to impeach the evidence of a witness in another.[23]

Should a lawyer representing a party in one action who has received documents from an opposing party be permitted to provide a copy of those documents (or even describe the information contained in those documents) to counsel for the same party in another action, perhaps in another jurisdiction? At what point is the implied undertaking breached? Is it the moment the lawyer provides the document or information to the lawyer in the second action? Or does the latter have to make some outward "use" of the document in the second action, such as filing it with the court, tendering it in evidence, or putting it to a witness on cross examination, before the undertaking is breached? If the rule requires that documents be used only in the proceedings in which they are produced, it would seem to follow that they could not be provided to a lawyer who has no retainer to deal with that action. On the other hand, how could a party prepare the materials to apply for an order permitting the documents to be used in another action (or even give informed instructions to bring such an application) if its lawyer in the second action could not review the documents to consider their potential relevance to that action? There does not appear to be a clear answer to these questions in the jurisprudence.

Should the implied undertaking survive disclosure in open court?

One of the issues that has troubled courts and rules committees in many jurisdictions is whether the implied undertaking should survive the disclosure of documents or information in open court, either when they are filed with the court or referred to during a hearing. In England, the common law provided that the undertaking continued notwithstanding the disclosure of the material in open court,[24] but this position was reversed by an amendment to English Order 24 of the *Rules of Court*. In Ontario, both at common law[25] and now under the *Rules of Civil Procedure*,[26] the implied undertaking does not apply to evidence that is filed with the court or that is given or referred to

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[23] See, e.g., *DPM Securities Inc. v. Costello*, [2005] B.C.J. No. 1533, 2005 BCSC 1022

[24] *Sybron Corporation v. Barclays Bank*, [1985] 1 Ch. 299, at pp. 321-22

[25] *Goodman, supra,* at p. 375

[26] Rule 30.1.01(5)

during a hearing. In contrast, the Nova Scotia Court of Appeal has held that the obligation continues after the document is read in open court.[27]

For many years, the law in British Columbia was as set out by Williams C.J.S.C. in *Discovery Enterprises*. After considering the law in England, Ontario and elsewhere in Canada, his Lordship concluded in that case that the undertaking should survive disclosure in open court:[28]

> In this case it was the recipient respondent which disclosed the documents in Court after they had been supplied under the implied undertaking by DEI. From a practical point of view one has to ask whether a receiving party should be able to avoid the implied undertaking by simply filing an affidavit with the documents in some interlocutory matter in Court? I think not.

For nine years, this remained the law in British Columbia. In *Litton v. Braithwaite*,[29] however, Halfyard J. reversed this position and held that the implied undertaking does not apply after documents have been introduced at trial. The change arose from the following passage from Kirkpatrick J.A.'s decision in *Doucette (litigation guardian of) v. Wee Watch Day Care Systems Inc.*, handed down a few months before:[30]

> Furthermore, the confidentiality of the discovery process in British Columbia evaporates once the evidence is tendered in court. The principle of open courts, including (with some limited exceptions) open court files, renders the confidentiality rule limited to the pre-trial process.

Halfyard J. cited this passage and held as follows:[31]

> In my opinion, the statement of the Court of Appeal at paragraph 80 of *Doucette (litigation guardian of) v. Wee Watch Day Care Systems Inc.* has changed the law as held by Williams C.J.S.C. in *Discovery Enterprises*

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[27] *Sezerman, supra,* at para. 57

[28] *Discovery Enterprises, supra*, at para. 29

[29] [2006] B.C.J. No. 2633, 2006 BCSC 1481

[30] [2006] B.C.J. No. 1176, 2006 BCCA 262, at para. 80

[31] *Litton, supra*, at para. 34

> *Inc. v. Ebco Industries Ltd.* While a decision on this point may not have been essential to the decision of the issue on appeal, in my view it is a firm statement of the court which should be followed by trial judges. If I am right, then it follows that the implied undertaking of confidentiality does not apply to the documents that were introduced in evidence at the trial of the divorce action. Accordingly, the plaintiff may use any of those documents in her action against Mr. Braithwaite, subject of course to relevance and admissibility.

Conclusion

In the 12 years since the implied undertaking was recognized in British Columbia and Ontario, there have been judicial calls for reforms to address the matter expressly in the applicable rules. Some of those calls have been answered. In *Goodman*, Morden A.C.J.O. discussed at length the advantages of amending the *Rules of Civil Procedure* to deal incorporate the implied undertaking.[32] The Ontario Civil Rules Committee responded less than a year later with the addition of Rule 31.1.01. Williams C.J.B.C. made a similar plea in *Discovery Enterprises* in 1997,[33] which has at yet gone unanswered.

It seems anomalous to have one of the most important aspects of discovery practice left out of the *Rules of Court*, particularly as it is one of the few aspects of civil practice that can be directly sanctioned by a finding of contempt. Including the undertaking of confidentiality in Rule 26 would not only give it the prominence it warrants, but would also provide the Rules Committee with an opportunity, after consultation with the Bench and Bar, to clarify some of the contentious issues surrounding its application and scope.

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[32] *Goodman, supra*, at pp. 373-74

[33] *Discovery Enterprises, supra*, at para. 36

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com