LITIGATION - CANADA

Judicial oversight required when seeking relief from deemed undertaking

February 21 2017 | Contributed by Dentons

The recent decision of Justice Wendy Matheson of the Ontario Superior Court of Justice in *SC v NS* dealt with the issue of how a party to a civil action should proceed when seeking to use documents produced under compulsion in a civil action when that party seeks to impeach a witness in a criminal case, against the background of the deemed undertaking which restricts the use of evidence disclosed in a civil action.(1)

Facts

Following an alleged sexual assault, the complainant in the criminal case commenced a civil action for damages against her former boyfriend, who was the defendant. In the civil action, the plaintiff produced – as she was obliged to – extensive private information, including medical records from four different health providers, counselling records, medical test results, photographs and academic records with grades. The court noted that the level of private information in these records was very high. While produced under compulsion, it was expected that such documents would be used in the civil action only.

Junior civil counsel for the defendant provided these documents to criminal counsel representing the defendant in the criminal case, for the stated purpose of impeaching the plaintiff as a witness in the criminal case. In the course of the criminal defence counsel's cross-examination of the plaintiff, he began to ask questions relating to information from the medical records that formed part of the plaintiff's productions in the civil action.

Once senior counsel representing the defendant in the civil action became aware of the disclosure of the plaintiff's productions that had been made without notice to the plaintiff, a motion was brought before the court addressing the issue as to whether notice should have been given to the plaintiff, her civil lawyer and the crown attorney regarding the intended use of her documents to impeach her in the criminal case.

The motion before the court was framed as follows:

- a declaration that the deemed undertaking in Rule 30.1.01 of the Rules of Civil Procedure had not been breached by the defendant; or
- an order under Rule 30.1.01(8) that the deemed undertaking did not apply in the particular circumstances of the case, retroactively.

Deemed undertaking

In 1995 the Ontario Court of Appeal in *Goodman v Rossi*(2) recognised an implied undertaking at common law which prevented the use of discovery documents or evidence obtained from the opposite party for any purpose other than the proper conduct of the litigation in which the material

AUTHORS

Norm Emblem

Aoife Quinn

Lisa Hawker

was produced. Leave of the court was required in order to depart from the implied undertaking.

The implied undertaking was subsequently codified in the Ontario Rules of Civil Procedure under Rule 30.1.01, as the deemed undertaking. The deemed undertaking is imposed on parties to civil litigation. The undertaking is founded on the compulsory nature of discovery in a civil proceeding, where parties are compelled to produce documents and submit to examinations for discovery during which they must disclose information, given the public interest in arriving at the truth. The primary concern underlying the undertaking is the protection of privacy – discovery is an invasion of the individual's right to keep one's evidence and documents to oneself. In some situations, self-incrimination is also an issue. The deemed undertaking is set out in Rule 30.1.01(3), as follows: "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."

However, Rule 30.1.01(6) provides that Rule 30.1.01(3) "*does not prevent* the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding" (emphasis added).

Rule 30.1.01(6) is silent on the question of what steps should be followed if a party intends to use the adverse party's discovery evidence for impeachment purposes in other proceedings.

The plaintiff argued that judicial oversight was required, which would include notice to the plaintiff. The essence of the defendant's argument was that:

- the exception to the deemed undertaking:
    - was automatic;
    - defeated any reasonable expectation of privacy; and
    - required no judicial oversight; and
- no such notice was required.

On the return of the motion before the court in the civil action, the affidavit filed on behalf of the defendant baldly stated that information in the plaintiff's productions was inconsistent with evidence of the plaintiff in the criminal proceeding.

The court was, therefore, for practical purposes, dealing with a matter that was left unaddressed by the Ontario Rules of Civil Procedure. As the motion before the court unfolded, the key questions were as follows:

- Is leave, notice or any other step required under Rule 30.1.01 in order to use an opposite party's discovery evidence for impeachment in another proceeding under Rule 30.1.01(6); and
- If so, should an order be made retrospectively permitting its use in this instance?

Decision

The court reasoned that, given the restrictions governing the documents and information produced in a civil action, directions should have been sought from the court by the defendant. Further, insofar as the undertaking set out in Rule 30.1.01 is an undertaking to the court, the court has an oversight role regarding compliance with the undertaking, which is not restricted to addressing breaches of the undertaking. The court noted that oversight may also be required when dealing with the exceptions to the rule.

The court noted that ordinarily the motion would be on notice to the party whose compelled discovery is proposed to be used. However, the court allowed for the possibility that the motion could be brought *ex parte* and left it to the motions judge to decide whether there should be notice. The court observed that 'notice' did not mean the provision of the full particulars of the desired impeachment, but it did mean that the defendant should have given the plaintiff notice of the intention to use the compelled documentary discovery for impeachment purposes. Further, the defendant should have sought directions about whether anything else was required. The court noted that the judge hearing the motion may have required additional steps.

The court rejected the defendant's argument that nothing else was required before permitting use of the entirety of a party's compelled documentary discovery in another proceeding. It observed that, following this approach, a party could hand over the entirety of an opposite party's compelled discovery to a third party on the mere possibility that there may be a chance to impeach sometime in the future. This approach would allow for wide sharing of personal information outside the civil proceeding for which it was produced, without any notice to those whose private information is being shared.

The court did not determine whether the documents could be used in the criminal trial. That was to be decided by the judge presiding over the criminal trial.

Comment

It is rare to have overlapping civil and criminal cases, but they happen often enough for the court's reasons to be required reading before counsel in a civil action provides any party's documentation or information produced in the civil action to anyone with the intention that such documentation or information be used to impeach or otherwise discredit that party in a criminal case or other proceeding. It raises an interesting issue regarding delaying the timing of production of documents from a plaintiff in a civil action, which would ordinarily raise concerns with the defendant regarding the reasons for such delay.

For further information on this topic please contact Norm Emblem, Aoife Quinn or Lisa Hawker at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com, aoife.quinn@dentons.com or lisa.hawker@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2017 ONSC 353. The identity of the parties in the case was purposefully not made public as the defendant was a young person at the time of the alleged sexual assault as defined under the Youth Criminal Justice Act, SC 2002, c1. It remains to be seen whether the Court of Appeal will differ in the event of an appeal. At the time of writing no notice of appeal had been filed.

(2) 24 OR (3d) 359 (CA).
