4 Confidentiality in Canadian Litigation

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Is there a difference between privilege and confidentiality?

[4.1] All privileged documents, by their very nature are confidential; however, not all confidential information is privileged. Confidentiality, unlike privilege, is not in and of itself a ground for refusing to disclose documents that are related to an issue being litigated.

The need to protect a party's legitimate interests in protecting confidential information from public dissemination, while ensuring the maintenance of public confidence in the administration of justice, is a challenge which is addressed by several rules of procedure which operate at different stages of a lawsuit. This chapter will discuss the various procedures a party can use to protect their confidential information.

General privacy statutes

[4.2] The Personal Information Protection and Electronic Documents Act (PIPEDA)[1] confers extensive rights on individuals to control the collection, use and disclosure of their personal information by organisations in the course of commercial activity. PIPEDA also has some implications for the collection, use, and disclosure of personal information in the litigation process. Generally speaking, information that satisfies the definition of personal information cannot be collected, used or disclosed without consent.[2] There are, however, several exceptions to this general rule. Section 7 of the Act specifically provides for circumstances in which personal information may be collected, used or disclosed without consent.

For litigation purposes, section 7(3) of PIPEDA provides the more relevant exceptions to the general rule that disclosure of personal information is not permitted without

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1 SC 2000, c 5 [PIPEDA].

2 Schedule 1, section 4.3 of PIPEDA.

consent. Section 7(3) allows an organisation to disclose personal information without the knowledge or consent of an individual where the disclosure is:

(1) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organisation;
(2) for the purpose of collecting a debt owed by the individual to the organisation;
(3) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;
(4) made to an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; or
(5) required by law.

Arguably, section 7(3) allows for the disclosure of personal information to a court or tribunal (as long as the tribunal has been given statutory power to compel production).[3] An order from a court appears not to be necessary as section 7(3) permits disclosure in accordance with the rules of court (ie provincial rules of civil procedure relating to document or oral discovery), or as required by law.

On a review of PIPEDA there does not seem to be any provision that bars the production of relevant documents in a court action. The Ontario Superior Court of Justice adopted this interpretation in *Lisozzi v Bell Distribution Inc*[4] The court held that section 7(3)(c) permits disclosure made to comply with an order of the court or to comply with the rules of court relating to the production of records. Provincial rules of civil procedure mandate discovery of documents relating to any matter in issue which are in the possession of the defendant. The court decided that the disclosure and provisions of the Rules of Civil Procedure fall within the exception set out in section 7(3)(c).

Sources of law on confidentiality

[4.3] There are several sources of confidentiality law in Canada. Provincial rules of civil procedure, federal and provincial statutes, and judge-made law all serve to protect confidential information at various stages of the litigation process.

Confidentiality and court documents

[4.4] Most provincial statutes and court rules provide that anyone is entitled to see a document filed with the court, unless an Act or an order of the court provides otherwise. The rules usually provide that a court may order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.[5] Clearly, a party who is compelled to refer to or produce information that it considers to be confidential should address the possibility of seeking confidentiality or sealing orders from the court.

When deciding whether documents should be sealed, the court must determine whether the principle of openness of court is outweighed by another principle of

3 *Paley v Fishing Lake First Nation* [2005] FCJ No 1772, at para 17.
4 [2001] OJ No 2378 (Ont Sup Crt) [*Lisozzi*].
5 Most provinces have this rule: Alberta, rr 6.29, 6.34; Manitoba, r 30.11; New Brunswick, r 31.12; Newfoundland, r 42.12; Northwest Territories, r 232; Nova Scotia, r 85.04; Ontario, r 30.11; PEI, r 30.11; and Saskatchewan, rr 286–88.

superordinate importance.[6] The question then becomes whether protecting the proprietary or competitive interests of a party is a value of such importance as to grant a protective order. The Ontario High Court of Justice in *A (J) et al v Canada Life Assurance Co*[7] identified several values that would outweigh the value of an open court including the protection of trade secrets:

> 'The third case – that of secret processes, inventions, documents or the like – depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands.'[8]

Under the *Federal Court Rules*[9] the Federal Court may make an order treating documents filed with the court as confidential. This would restrict the ability of the public to view the filed documents. The Supreme Court of Canada in *Atomic Energy of Canada Ltd v Sierra Club of Canada*[10] upheld the use of confidentiality orders and spoke generally on the test to be met before a confidentiality order should be granted. This test is applicable to all provincial rules providing for confidentiality or sealing orders.[11]

AECL resisted Sierra Club's application for the production of confidential documents on the ground that the documents were the property of Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities allowed disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court. The court had to determine whether a confidentiality order was an infringement of section 2(b) of the Canadian Charter of Rights and Freedoms which provides: 'Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.[12] The Supreme Court of Canada decided that section 2(b) of the Charter would not be violated by a confidentiality order if the courts believed that a two-pronged test for making a confidentiality order was satisfied.

This test asks whether: (a) a confidentiality order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. In this case, the court decided to grant the confidentiality order.

6 *Law Society of Upper Canada v Telecollect Inc* (2001), 56 OR (3d) 296.
7 *A (J) et al v Canada Life Assurance Co* (1989), 70 OR (2d) 27.
8 *Ibid*, at 34 citing Lord Shaw in *Scott v Scott*, [1913] AC 417 (HL) at 483.
9 Federal Court Rules, r 151: '(1) On motion, the court may order that material to be filed shall be treated as confidential. (2) Before making an order under subsection (1), the court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.'
10 (2002) 211 DLR (4th) 193 [*Sierra Club*].
11 See for example: *Hollinger Inc (Re)* (2011), 107 OR (3d) 1, at para 11, where the Ontario Court Appeal held that the *Sierra* test is the proper test to apply to determine if a confidentiality order should be granted.
12 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

The court decided that the 'important commercial interest' discussed in the first prong of the test, cannot merely be specific to the party requesting the order. The interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, in the case before the court the AECL argued that exposure of information would cause a breach of a confidentiality agreement. After reviewing all the factors involved in the first prong of the test, the Supreme Court of Canada held that the AECL had satisfied it.

The second prong of the test, dealing with proportionality, involves weighing the benefits of the order against the harms. In *Sierra Club*, one of the benefits of the confidentiality order was the maintenance of public security. Another benefit was that if it were granted, the AECL would be able to use the information as part of their defence. If the order were not granted, then the AECL would not produce the documents. As such the primary interest that would be promoted by the confidentiality order was the public interest in the right of a civil litigant to present its case, or, more generally, the right to a fair trial. Because the fair trial right was being invoked in order to protect commercial, not liberty, interests of the AECL, the right to a fair trial was not a Charter right; however, a fair trial for all litigants was recognised by the Supreme Court of Canada as being a fundamental principle of justice.

The Supreme Court of Canada in *Sierra Club* reaffirmed that public access to judicial proceedings should not be interfered with except where necessary and in a manner that is least restrictive of the public's right to access information.

In order to vary or set aside a protective or confidentiality order, a party must convince a judge that there has been a material change in circumstances that requires a second look at the order. Varying or setting aside a confidentiality order can become more complicated when an order affects a non-party to the proceeding in which the order was made. Such was the case in *Ivandaeva v Ivandaeva*.[13]

The defendant's argument in this case was that an original sealing order was made without notice to them, a party whose interests were affected by the order. As such, the defendants argued that the order should be set aside or varied. The court held that the defendants did not have standing to vary or set aside the order, as they had not established that they were a party affected by the order. The court held that a non-party who desires to set aside or vary an order must show that they have standing by establishing that they have a direct interest affected by the confidentiality order. As such, the court denied the defendants motion to set aside or vary the confidentiality order.

It should be noted that protective orders only provide for protection with respect to documents which are *filed with the court*. They offer no protection to documents that are exchanged between the parties before they are filed with the court; nor do they typically restrict the use which a party makes of a document or information it has received from another party to the litigation.[14] The court, however, has the inherent power to control and prevent abuse of its process, and may make express non-disclosure orders that restrict a party and his or her solicitors from releasing such a document to other parties or using it for ulterior purposes.[15] The courts

13 (2003) 63 OR (3d) 769 (Ont CA) [*Ivandaeva*].
14 *National Gypsum Co v Dorrell* (1989), 68 OR (2d) 689 (HCJ) [*National Gypsum*].
15 *Ibid*, at 694.

have generally exercised this power so as to prevent a particular use of documents produced for discovery.[16] This type of extended protective order can also be used to protect pleadings that contain confidential information.

Parties who wish to avoid the expense, inconvenience, or uncertain outcome of applying for a confidentiality order occasionally resort to delivering a pleading that is vague, or which altogether omits to disclose confidential information that is essential to the claim or defence. There is very little case law in Canada on deliberate lack of specificity in a pleading as a means of protecting confidential information, but in the absence of explicit protective orders, most judicial decisions seem to favour specificity in pleading over the protection of confidential information. The primary purpose of a pleading is to define the issues and to circumscribe the areas of factual inquiry. Full disclosure of material facts is necessary in a pleading, so as to enable a party properly to formulate its position and prepare for later discoveries. It has been held that a defendant should not have to wait until discoveries to learn what is the alleged confidential business information that it supposedly misused.[17]

It is understandable that a plaintiff who believes that the defendant has stolen its confidential information may not wish to publish that information to the world in a pleading, thereby reducing or eliminating its value to both parties. A plaintiff in that situation should consider applying to the court for an order sealing the pleadings and providing other protections against publication of the confidential information before the action is formally commenced. In an emergency, such an order may be obtained without notice to the other party, but with the other party being given the right to move to have the order varied or set aside once the other party has been served with a copy of the order. Another alternative is to plead without specifying the confidential information stating that the information is within the knowledge of the opposite party and that the information will be provided once the appropriate protective orders have been obtained. If the opposing party then applies for particulars of the confidential information, the party seeking to protect the confidential information can indicate that it is willing to consent to an order requiring that such particulars be delivered conditional upon confidentiality protections being put in place by the court. Obviously, in all of these scenarios the final arbiter of what is fair and reasonable in the circumstances will be the court itself, if the parties cannot agree.

What types of documents are protected?

'For your eyes only' orders – disclosing documents only to opposing party's solicitor

[4.5] Cases where a protective order is needed are quite common. For instance, if a plaintiff is claiming a trade secret infringement (eg the use of a secret production process) by one of their former employees, now employed with a competitor, the plaintiff may argue that the starting point for disclosure should be the disclosure of the defendant's production methods.[18]

16 *Ibid*; see also *Anderson v Anderson* (1979), 26 OR (2d) 769; *Reichmann v Toronto Life Publishing Co* (1988), 28 CPC (2d) 11 (Ont HCJ) [*Reichmann*]; *Lac Minerals Ltd v New Cinch Uranium Ltd* (1985), 50 OR (2d) 260. See discussion below of the 'implied undertaking rule' which applies to documents exchanged in the litigation process.

17 *Buddy L Consultants v Williams* [2000] 1 CTC 40, [1999] AJ 1232 [*Buddy L* cited to AJ].

18 Facts are taken from *CPC International Inc v Seaforth Creamery Inc* (1996), 49 CPC (3d) 363, [1996] OJ No 1353 (Ont Gen Div).

Obviously most defendants would object to such a proposal. Defendants would be fearful that if they disclose first, the plaintiff would claim that such information is part of the plaintiff's own trade secrets. Even if none of the plaintiff's trade secrets is used in the defendant's production, the defendant will not want to divulge information to the plaintiff that is not known to the plaintiff and which might be used to the advantage of the plaintiff as a competitor. The defendant would almost certainly not want to produce any information relating to the production methods used before the hiring of the new employee. In accommodating these legitimate concerns the courts have used their inherent jurisdiction to make protective orders to supplement the deemed undertaking rules.

In making a protective order, the governing objective for the court is to resolve the conflicting interests of the parties by ordering a controlled measure of discovery to selected individuals upon terms that ensure there should neither be use, nor further disclosure, of the disclosed trade secrets to the prejudice of the party disclosing, yet ensure that the party claiming infringement gains such disclosure as is necessary and consistent with adequate protection of any trade secrets of the disclosing party.[19] This mode of disclosure seems appropriate when weighing the need for disclosure and the fact that trade secrets only have value if they are not generally known. When determining whether full disclosure of trade secrets should be made, the court should determine whether the probative value of such disclosure is clearly outweighed by the adverse effect which disclosure could have.[20]

Protective orders have been granted that allow a solicitor and not his or her client to view the confidential information.[21] They have also been granted to ensure that confidential information be disclosed only to certain people who themselves agree to be bound by the order.[22]

Obviously there are concerns with any protective order that denies counsel the ability to make full disclosure to their client. Indeed, the entire solicitor–client relationship can break down if the client is unable to give instructions to counsel because they lack the relevant information. To combat this problem, most orders that restrict disclosure to counsel only, often have provisions that allow counsel, if they deem it necessary for advice in connection with the action, to disclose the contents of individual documents to individuals who may have been involved with the matters described in the documents. This will only be allowed if the individual signs a written undertaking to the court not to use the information for any purposes other than the action and not to disclose in any manner any portion of the contents of the documents to any person other than legal counsel in the action. In addition, the protective order will usually include a provision that prohibits counsel from showing the individual the actual

19 *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 (CA).

20 *GWL Properties Ltd v WR Grace & Co of Canada Ltd* (1992), 70 BCLR (2d) 180, at 184, 185 (SC); *Maverick LNG Holdings Ltd v Teekay Shipping (Canada) Ltd (cob Teekay Corp.)*, 2009 BCSC 1538.

21 *Automated Tabulation Inc v Canadian Market Images Ltd* (1995), 24 OR (3d) 292 (Gen Div) where disclosure was denied to an opposing party, but allowed to that party's solicitors and experts; *Procter & Gamble Co v Kimberley-Clark of Canada Ltd* (1989), 25 CPR (3d) 12 (FCA); *Harnischfeger Corp of Canada Ltd v Kranco Inc* (1991), 39 CPR (3d) 81 (BCSC) at 85: 'the authorities make it clear that all reasonable steps should be taken to minimise the extent of the disclosure of information which is alleged to be confidential, especially to a competitor'; *1483860 Ontario Inc (cob Plan IT Search) v Beaudoin*, 2010 ONSC 6294, at paras 113–116.

22 *ER Squibb and Sons Ltd v Apotex Inc* (1993), 15 CPC (3d) 169, [1993] OJ No 404; *Ed Miller Sales and Rentals Ltd v Caterpillar Tractor Co*, [1986] 43 Alta LR (2d) 299, [1986] AJ No 176 (Alta QB) [*Miller Sales*], at 2 where information was allowed to be disclosed to parties in litigation; *Claimspro Inc v Riddell*, 2011 ABQB 111 [*Claimspro*].

document or copies of documents that were discussed for advice.[23] It should be noted that a 'for counsel's eyes only' protective order is very rarely given.[24]

Often a court will order that discovery will only be made once the opposing side undertakes to abide by the protective order.[25] Court orders or required undertakings could also provide that all written material concerning confidential information should be destroyed immediately upon the conclusion of the litigation, including all transcripts of examinations.[26] These protective orders do not usurp the implied undertaking. The implied undertaking exists notwithstanding the existence of a protective order, which may supplement or modify the implied undertaking.[27] The protective order may be used to make up for the deficiencies of the implied undertaking rule. Unlike the implied undertaking rule, information that is under a protective order may not be disclosed by the party subjected to the order even if the information is filed with or read out in open court.[28]

Cases where more than the deemed undertaking is necessary usually occur in situations where there is a competitive business relationship between the parties or where there is evidence of a 'real risk' for abuse of discovery information.[29] If the party who is subjected to the undertaking is part of a profession that already owes a professional duty of confidentiality then a protective order may not be granted.[30] An example is the confidentiality owed by an accountant or a lawyer to his or her client. In the setting of a large accounting or law firm the court may, however, make an order requiring an express undertaking from secretarial or clerical staff within a professional firm.[31]

The test of whether a protective order is necessary differs from jurisdiction to jurisdiction. In Alberta, the courts have suggested that either the information contained in the discovery is of such a nature as to require the order (patent processes, trademark rights, sensitive or personal information, or in highly competitive industries), or where there is a 'real risk' of the abuse of discovery. It is sufficient to have one of the two aforementioned elements to request a protective order.[32] There are, however, at least two cases in Alberta that have decided that the test for a protective order is a 'real risk' of abuse of discovery.[33] In Nova Scotia, courts require that there be sensitive commercial information in a competitive industry as well as a 'real risk' of abuse. A protective order will only be given if both elements are met.[34] In Ontario, the courts are empowered by their inherent jurisdiction and rule 30.11 of the Ontario Rules of Civil Procedure, to grant a protective order to limit disclosure. Ontario courts have looked at all the factors mentioned above to determine whether a protective order should be granted. Some of these factors include: the information is confidential; that it is commercially sensitive; and that a competitor could obtain an unfair advantage

23 An example of such an order can be found in *Miller Sales, ibid*, at 3 and in *Claimspro*, *ibid.*
24 *Novopharm Ltd v Glaxo Group Ltd et al* (1998), 81 CPR (3d) 185 (FCA); *Novopharm Ltd v Nycomed Canada Inc*, 2011 FC 109, at para 36.
25 *Grant v Monsanto Canada Ltd et al* (1979), 101 DLR (3d) 594 (Alta SC (TD)).
26 *Ibid*, at 600.
27 *Lubrizol Corp v Imperial Oil Ltd* (TD) [1991] IFC 325; [1990] FCJ No 816 [*Lubrizol*].
28 *Ibid*, at 330.
29 *Canada Deposit Insurance Corp v Canadian Commercial Bank* (1990), 68 DLR (4th) 754 (Alta QB) [*Canadian Commercial*].
30 *Ibid*, at 757.
31 *Ibid*, at 760.
32 *Hamilton v Alberta (Minister of Public Works, Supply and Services)*, [1991] 5 WWR 232 (Alta QB).
33 *Wirth Ltd v Acadia Pipe & Supply Corp* (1991), 50 CPC (2d) 273; *Canadian Commercial,* above note 29, at 765.
34 *TransCanada Pipelines Ltd v Nova Scotia (Attorney General)* (1999), 179 NSR (2d) 364, 40 CPC (4th) 362, [1999] NSJ No 369 (NSSC).

through its release. However, even if these facts are satisfied, showing that a protective order would unduly prejudice the party opposing the protective order could still defeat the request.[35]

Thus, in Ontario it has been held that there is a three-part test to a protective order. The moving party must show that the document is confidential, that the information is commercially sensitive and that a competitor could obtain an unfair advantage if it were released. If the court is satisfied on all of those points then a protective order will be made, unless the court is satisfied that the opposing party will be unduly prejudiced.[36] Noticeably missing from the Ontario test is any reference to the 'real risk' of abuse test found in the Alberta and Nova Scotia tests.

Use of documents produced in court proceedings

[4.6] In Canadian litigation, there is one rule of general application that protects a party against the use of information produced in the litigation by an opposing party for any other purpose outside of the litigation itself. This rule of general application is described as an 'implied undertaking'.

The implied undertaking with respect to information produced in the course of civil litigation applies independently of any obligation existing under the general law of confidentiality.[37] Generally, the implied undertaking rule enforces an obligation on the party to whom documents and information are produced in litigation, not to use the documents and information for a collateral or ulterior purpose. Any such ulterior use of the documents is a contempt of court.[38] The undertaking will apply to counsel, their clients and any third person to whom the party must release the document; this includes experts retained by the parties or their counsel.[39]

The implied undertaking rule has been described as judge-made procedural law arising from the inherent jurisdiction of the court to control its own process.[40] Unlike other undertakings where a party explicitly provides the undertaking or the court orders that the undertaking be given, a party subjected to the implied undertaking does not have to consent to the undertaking or be ordered by the court not to disclose the information obtained on discovery. Because a party has been given access to, and the use of, the documents for a particular purpose there is a necessary implication that they are not to be used for any other purpose.[41] Another rationale supporting the existence of an implied undertaking rule is that a litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceeding in which they are demanded will be encouraged to provide a more complete and candid discovery.[42]

In Ontario, the implied undertaking rule has been codified in rule 30.1.01 of the Rules of Civil Procedure.[43] Rule 30.1.01 states that all parties and their counsel are deemed to undertake not to use evidence or information obtained from the discovery

35 *BASF Canada Inc v Max Auto Supply (1986) Inc* (1999), 30 CPC (4th) 23, [1999] OJ No 515 (Gen Div); *Inline Fiberglass Ltd v Omniglass Ltd* (1992), 12 CPC (3d) 240, at p 3.
36 *GasTOPS Ltd v Forsyth* (2000), 15 CPC (5th) 116, [2000] OJ No 5614 (Gen Div).
37 *Lubrizol*, above note 27.
38 *National Gypsum,* above note 14, at 694.
39 *Winkler v Lehndorff Management Ltd* (1998), 28 CPC (4th) 323, [1998] OJ No 4462 (Ont Gen Div).
40 *National Gypsum,* above note 14, at 692.
41 *Lindsey v Le Sueur* (1913), 29 OLR 648 at 655.
42 *Jurman v Doucette* [2008] SCJ No 8, at para 26 [*Jurman*].
43 Rules of Civil Procedure, RRO 1990, reg 194, r 30.1.01.

process for any purpose other than those of the proceeding in which the evidence was obtained.[44] The rule provides automatic exceptions where: the other party consents to the use of the evidence; the evidence is filed with the court; or the evidence is given or referred to during a hearing.[45] There is also an exception to permit the use of evidence obtained in one proceeding to impeach the testimony of a witness in another proceeding.[46] The rule also provides that on a motion, the court may order that the undertaking does not apply to the evidence and the court may impose such terms and give such directions as are just.[47]

The deemed undertaking rule does not apply to documents produced pursuant to the discovery process or transcripts of examinations for discovery that are filed with the court. To ensure a party is not caught off guard by the filing of discovery transcripts or other documents obtained during discovery it may be possible to obtain an order requiring all parties to provide notice prior to filing the documents with the court. This will allow a party time to seek a sealing order, if necessary, before the documents are filed with court. In both *Prudential Consulting Inc v Correia* and *Hallstone Products Ltd v Canada Customs and Revenue Agency*, a party was concerned that the opposing party would bring a pre-trial motion and would file documents produced pursuant to the discovery process or transcripts of examinations for discovery with the court. The moving party sought a sealing order to ensure that if a pre-trial motion was brought and the documents were filed with the court the documents could not be used in other proceedings. In both cases, the request for a sealing order was denied. The court found that it was mere speculation that a pre-trial motion would be brought. However, the court ordered that any party seeking to file discovery documents with the court must provide advance notice to the opposing party to allow the opposing party time to seek a sealing order before the documents are filed with the court and the deemed undertaking rule no longer applies.[48]

In keeping with the importance attached to the implied undertaking, the courts have identified a number of remedies which may be available to a party seeking to enforce the undertaking. A breach of the undertaking is a contempt of court.[49] Sanctions can be imposed when a party releases the information to another party, or uses it against the disclosing party in another proceeding. A restraining order can be granted to bar disclosure of information or documents protected by the undertaking.[50] It is also possible that damages may be awarded where such can be proven to have resulted from a breach of the undertaking.[51] Further, where documents subject to the undertaking are used to found a new action, the second action may be struck out or stayed.[52]

In cases dealing with the Crown, courts have enforced the deemed undertaking by ordering the Crown to return documents produced on discovery that had not been made part of the public record. In this way, the implied undertaking would prevent the documents from being subjected to public disclosure through the Access to

44 Rule 30.1.01(1) and (3).
45 Rule 30.1.01(4) and (5).
46 Rule 30.1.01(6).
47 Rule 30.1.01(8).
48 *Prudential Consulting Inc v Correia* (2008), 170 ACWS (3d) 298, at para 12; *Hallstone Products Ltd v Canada Customs and Revenue Agency* (2006), 82 OR (3d) 368, at paras 34–6, 42.
49 *Reichmann,* above note 16; *Rivait v Gaudry* (1993), 15 OR (3d) 159; *Orfus Realty v DG Jewellery of Canada Ltd* (1995), 24 OR (3d) 379; *Jurman*, above note 42, at para 29.
50 *Reichmann*, above note 16.
51 *Carbone v De La Rocha* (1993), 13 OR (3d) 355 (Ont Gen Div) [*Carbone*]; *Rosbrook Estate v Baker* (1989), 1 WDCP (2d) 40 (Ont HC).
52 *Ibid*; *Jurman*, above note 42, at para 29.

Information Act[53] or the Library and Archives of Canada Act[54] whereby members of the public may obtain access to documents in the possession of the government.[55]

The courts, exercising their inherent jurisdiction have found methods of protecting confidential information. The general approach of the courts has been described as:

> '1. A party to litigation has a prima facie right of unrestricted inspection of the documents of which discovery has been made by the other party so far as may be necessary to dispose fairly of the case or for saving costs. 2. A party is not entitled to use his or her right of inspection for any collateral purpose. 3. If it is shown that there is a real risk of a party using his or her right for a collateral purpose, the Court has power to impose restrictions on such right in order to prevent or discourage him from doing so. I think that this power is derived from the inherent jurisdiction of the Court to prevent abuse of its process ...'[56]

The courts have often divided cases into three broad categories. The first level of cases is where the implied undertaking is sufficient. A majority of the cases that come before the court need nothing more than the implied undertaking. The next level of cases is where a court may require a formal undertaking by the party or their Counsel not to misuse the information. Finally, the extreme position is composed of a 'small hard core of cases' where additional precautions are necessary to ensure no abuse of the discovery process occurs.[57] In cases where more than an implied undertaking is required, parties may make a motion for a protective order.

Exceptions to the implied undertaking rule – using documents obtained through disclosure for ulterior purposes

[4.7] A court clearly retains the discretion to relieve a party from the implied undertaking.[58] A breach of the undertaking when relief has not been granted could constitute an abuse of process.[59] The consequences could be dire, including contempt of court proceedings.

Under both the common law and provincial court rules, courts have the authority to grant relief from the undertaking in the appropriate circumstances. Relief can be granted in special circumstances as long as the injustice to the discovered party is outweighed by a greater injustice to the party seeking to use the documents or evidence subject to the implied undertaking.[60] As such, a court in determining whether to grant an exception to the implied undertaking rule should query whether 'the interest of justice outweighs any prejudice that would result' to the disclosing party.

Courts are hesitant to grant relief from the implied undertaking rule. Special circumstances are required to depart from the rule.[61] Otherwise, the utility of the rule would

53 RSC 1985, c A-1.
54 SC 2004, c 11.
55 *Andersen Consulting v R* (2001), 9 CPC (5th) 245 (FCTD).
56 *Miller Sales*, above note 22, at 2.
57 *Miller Sales*, above note 22, at 3.
58 *Goodman v Rossi* (1995), 24 OR (3d) 359, [1995] OJ No 1906 [*Goodman*]; *Jurman*, above note 42, at para 30.
59 *Kinsmen Club of Kingston (cob Summerhill Apartment) v Walker* (2004), 69 OR (3d) 453, [2004] OJ No 137 at para 34 (Sup Ct) [*Kinsmen*].
60 *Ibid*, at 16; *Rules of Civil Procedure*, RRO 1990, reg 194, r 30.1.01(8); *Sanofi-Aventis Canada Inc v Apotex Inc* (2008), 66 CPR (4th) 391, at paras 18–20.
61 *Disher v Kowal* (2001), 56 OR (3d) 329, [2001] OJ No 4814 (Sup Ct), at para 24 [*Disher*]; *Antoncic v Wylie* (2009), 73 CCEL (3d) 45.

be undermined. As the Supreme Court has stated, '… the courts will avoid exercising the power too routinely, as to do so would compromise the usefulness of that rule, if not its very existence.'[62] It will therefore be inherent in this principle that relevant evidence will sometimes not be available.[63]

The ability of a party to clear their name by using documents produced by the Crown is a significant enough prejudice to outweigh the policy concerns of protecting the implied undertaking. In *Ribeiro v Bank of Nova Scotia,*[64] the plaintiff was accused of a crime and wanted to bring an action to clear his name. In *Ribeiro*, the court held that when the disclosing party is the Crown, it will be easier to show that the Crown's privacy interest will be outweighed by the interests of the party seeking relief from the implied undertaking.[65]

The foremost consideration in granting relief from an implied undertaking is the policy rationale behind the implied undertaking rule. The policy rationale includes the encouragement of full disclosure and the protection of litigants' privacy. The public interest in encouraging voluntary production exists independently of any particular prejudice suffered by the discovered party.[66]

Courts have refused to relieve a party from the implied undertaking when the purpose would be to found a further action against the party bound to produce the documents.[67] This was demonstrated in *Goodman*, *Disher*[68] and *Patterson v Johnson*.[69] In all three wrongful dismissal cases, additional material had been found by the plaintiffs during the discovery process. The plaintiffs then wished to file additional claims for libel or defamation due to the discovered documents. In all three cases, relief from the deemed undertaking rule was denied. That being said, it was stated in *Lockheed Martin Inc v Bombardier Inc* that, '… it must be recognised that any individual, including a corporation, enjoys a fundamental right to bring an action when warranted'.[70]

The purpose of disclosing the information subject to an implied undertaking is an important factor that a court will consider in deciding whether to grant relief from the rule. The court will look at whether the purpose sought to be served by use of the information is inappropriate. As such, it is important that the motivations behind the application be disclosed.[71] For instance, courts have rejected requests to use disclosed documents subject to the implied undertaking where the applicant sought to use the documents to reveal trade secrets. In addition, if the party seeking relief intends to expose the plaintiff to some separate peril or other prejudice, then the collateral use will not be allowed.[72]

The goal of the party seeking relief from the undertaking in *Colortech Painting & Decorating Ltd v Toh*[73] was to reveal information to Canada Revenue about unpaid

62 *Lac d'amiante du Quebec ltee c 2858-0702 Quebec Inc* [2001] 2 SCR 743, [2001] SCJ No 49, at para 77; *Jurman*, above note 42, at para 32.
63 *London Life Insurance Co v Konney* (1998), 41 OR (3d) 706, at 710 (Gen Div) [*London Life*].
64 [2002] OJ No 3597 (Sup Ct) [*Ribeiro*].
65 *Ibid.*
66 *Merck v Apotex* (1997), 1 CPR (4th) 58, at para 21 (FCTD) [*Merck*].
67 *London Life,* above note 63, at 709–10.
68 *Disher*, above note 61; *Goodman*, above note 58.
69 (1998), 21 CPC (4th) 262 (Man Master).
70 (2002), 214 DLR (4th) 179, at para 30 (Sup Ct).
71 *Schreiber v Canada (AG)* (2000), 2 CPC (5th) 69 (Alta QB), at paras 17, 22.
72 *Carbone*, above note 51, at 368.
73 (2000), 9 CPC (5th) 350 (Alta QB) [*Colortech*].

GST in order to bring about a settlement. This purpose was found to be both improper and collateral. In *Colortech*, it was held that revealing information to try and effect a settlement was clearly an improper purpose.[74] The court discussed the impact on the right against self-incrimination and also pointed out the lack of the basic requirements for relief from the rule. In balancing the interests of the parties, there was no indication of what the prejudice to the applicant would be in not being permitted to reveal the information to a government agency.[75]

One reason for relieving a party of the implied undertaking is that the parties in the proceeding where the document was disclosed are the same as the other proceeding where the party wishes to use the document. This will occur in cases where a party alleges a common law tort in a court action and simultaneously commences a regulatory complaint under a statute that provides a remedy. This was the case in *Gleadow v Nomura Canada Inc*.[76] In *Gleadow*, the plaintiff made an application for relief from an implied undertaking. The court decided that there were several circumstances justifying relief in the present case. The parties in this action and in the regulating proceeding were the same, the issues in both proceedings were the same, and the Employment Standards Officer was empowered to order production of the documents in any event. Therefore, the defendant could be compelled to produce the documents. There was no law prohibiting the plaintiffs from raising the issue of vacation pay in both proceedings.[77]

In *Gleadow,* the court listed several factors supporting the use of disclosed documents in another proceeding. These factors included,

(1) identical parties in both proceedings;
(2) the absence of affected third parties;
(3) the same issues being adjudicated upon in both proceedings;
(4) the documents being compellable in the second proceeding; and
(5) no legal obstacle to the second proceeding being undertaken simultaneously.

An important factor in granting relief is the extent to which the new proceeding is connected to the proceeding where the disclosure was originally made. In the case where the two proceedings involved the same or similar parties and issues, the court would be most willing to grant leave.[78] The *Gleadow* list, however, has not been universally accepted. In *Merk*, the Federal Court stated that if the information was compellable in a second proceeding, then production ought to be compelled rather than the court granting an exemption from the implied undertaking rule.[79]

On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest.[80]

A common issue in the case law is the effect of concurrent or consecutive actions in different jurisdictions or forums. It appears that the implied or deemed undertaking

74 *Ibid*, at para 52.
75 *Ibid*, at paras 53–54.
76 (1996), 44 CPC (3d) 133, [1996] OJ No 668 (Gen Div) [*Gleadow*].
77 See also *Leach v Assaly* (1998), 28 CPC (4th) 239; *Browne v McNeilly*, [2000] OJ No 1805 (CA).
78 Laskin, JA 'The Implied Undertaking In Ontario' (1990), 11 Adv Q 298. See also *BE Chandler Co v Mor-Flo Industries Inc* (1996), 30 OR (3d) 139 (Gen Div); *Ribeiro,* above note 64; *Jurman*, above note 42, at paras 33–36.
79 *Merck*, above note 66.
80 *Jurman*, above note 42, at para 36.

rule will also apply to actions commenced in other jurisdictions. In *Ring v Canada (Attorney General)*, Justice Adams found that the plaintiff was bound by an implied undertaking. The release of the information for the purpose of another matter in another court in another jurisdiction would constitute a breach of the implied undertaking in the absence of an order from the court relieving the plaintiff of the burden of the undertaking.[81]

The court is less likely to relieve a party of the implied undertaking when a third party is making the request. Generally, the court will refuse a non-party's motion to obtain access to documents disclosed during discovery or the examination for discovery of a party who was involved in separate litigation with the non-party.[82]

Such was the case in *Livent Inc v Drabinsky*, where the court decided that relief from the deemed undertaking rule can only be given where the court is satisfied that the interests of justice outweigh any prejudice to the party who disclosed the evidence. The subrule does not refer to non-parties seeking relief, but non-parties could seek relief at common law. The court held that the integrity of the deemed undertaking rule is to be preserved unless the party seeking relief can demonstrate that the interests of justice will be fostered by disclosure.[83]

In *Lubrizol*, the court heard a motion to cause certain portions of the transcript of the trial proceedings to be made subject to the protective order. In deciding this motion, the court had to consider the principle of an open court. The court held that while an interested member of the public could have attended the trial and would have been aware of everything in the transcript this would not relieve a party of the implied undertaking. In this case the confidential information was given in evidence at an open trial and thus potentially came to the attention of the public. To that extent, the confidential information that came to the attention of the public had lost its confidentiality, but that did not relieve the parties of their implied undertakings. The court decided that the written transcripts of trial evidence were prepared for the benefit of the judge and of the parties for the purposes of the trial and any appeals; and it was not, unless so ordered, made a part of the file. It was not prepared for public use. As such the court made the transcript record part of the protective order.[84]

The decision in *Lubrizol* has been modified in Ontario by the enactment of rule 30.1.01(5)[85] of the Rules of Civil Procedure, which provides that any documents that are filed or read in open court will no longer be subject to the implied undertaking no matter who has caused it to be filed or read in open court. Thus, a party may relieve themselves of the undertaking if they have the document filed or read in open court. Once this is done the information may be used for any purpose unless a specific protective order is obtained.

The potential for the abuse of this rule is obvious, as is the danger of relying on the implied undertaking rule for the protection of truly sensitive information. In the absence of explicit protective orders, a party could file a document with the court

81 *Ring v Canada (Attorney General)*, 2009 NLTD 39, at para 3.
82 *Livent Inc v Drabinsky* (2001), 53 OR (3d) 126, 2001 Carswell Ont 717 (SCJ) [*Livent*]; *Jurman*, above note 42, at para 36.
83 *Livent, ibid.*
84 *Lubrizol*, above note 27.
85 Rule 30.1.01(5) reads as follows:
'Subrule (3) does not prohibit the use, for any purpose, of,
(a) evidence that is filed with the court;
(b) evidence that is given or referred to during a hearing;
(c) information obtained from evidence referred to in clause (a) or (b).'

and use it in its pleadings or trial such that the confidentiality of the document is lost. This could be used as an effective (albeit abusive) tactic in the litigation process and, in appropriate cases, such tactics may well be sanctioned by the court as contempt of court or abuse of process. However, the fear of losing the implied undertaking as it relates to the confidential information may be enough to deter a party from continuing with their claim or defence. In such cases, it may be necessary for the disclosing party to seek specific protective orders.

Only Manitoba, PEI and Ontario have codified the deemed undertaking rule, so it may be questionable as to whether the law as articulated in rule 30.1.01(5) is part of the common law rule. The *Lubrizol* decision suggests that it may not be.

There have been several cases in which parties have sought relief from the implied undertaking rule on the basis that criminal or regulatory action should be taken against the disclosing party. In *75568 Ontario Ltd v Linchris Homes Ltd*[86] the plaintiff sought leave to provide the police with transcripts of the examination for discovery of the defendants. The plaintiffs alleged that the defendants had committed a crime by accepting a secret commission. The court held that the public interest in investigating possible crimes was 'not per se a sufficient ground to relieve counsel of his or her implied undertaking to keep such information private'. There were several rationales for this standpoint. The first was the concern that the compulsory nature of discovery would have a very perceptible impact on the right against self-incrimination. The court was also concerned about the plaintiff using a criminal investigation to obtain more information or put pressure on the defendants to settle, neither of which was a proper purpose.

In other regulatory proceedings, the undertaking may not be engaged. In *Law Society (Alberta) v Randhawa,*[87] the Queen's Bench held that the rule did not apply to self-regulatory matters contemplated under the relevant Legal Professionals Act.[88] It has also been decided that there is no deemed undertaking protection for evidence gathered under the *Coroners Act*[89] in an autopsy.[90]

Will production of information be ordered where such production would violate the laws of another state?

[4.8] The effect on foreign laws will generally be considered when it becomes necessary to impose sanctions on an individual who chooses to withhold information on the basis of foreign laws requiring non-disclosure. At that time, a party may adduce evidence of foreign laws that prohibits him or her from answering certain questions or producing relevant information.[91]

The Ontario Court of Appeal in *Frischke v Royal Bank of Canada* [92] decided that Panamanian secrecy laws could be used as an excuse to avoid a duty to disclose. The court decided that a court will not ordinarily make an order that would require

86 (1999) 1 OR (3d) 649 (Gen Div).
87 [1996] 7 WWR 664, [1996] AJ No 454 (QB).
88 SA 1990, c L-9.1.
89 RSO 1990, c C37.
90 *Nowakowski v Mroczkowski Estate* [2003] OJ No 649 (Supt Ct)
91 *Comaplex Resources International Ltd v Schaffhauser Kantonalbank* (1991), 5 CPC (3d) 180 (Gen Div) [*Comaplex*].
92 (1977), 4 CPC 279, 17 OR (2d) 388 [*Frischke*].

someone to compel another person in a foreign jurisdiction to break the laws of that foreign state. Even though the information they wish to obtain was urgently required by the applicant to trace moneys that were the subject of the action, urgency alone did not justify departure from the established rule. The court reasoned that they should not assist in the breaking of laws of another state.

This case was distinguished in *Comaplex Resources International Ltd v Schaffhauser Kantonalbank*.[93] In *Comaplex*, the Ontario High Court had to decide whether to grant a motion by the plaintiff to compel the defendant to produce documents and answer questions which were refused on examination for discovery. The plaintiff argued that a party to litigation before a Canadian court must disclose the information regardless of the consequences to it under the laws of the foreign jurisdiction in which it resides. The defendant was a party to litigation in Ontario and subject to the jurisdiction of the Ontario court. The court agreed and ordered the witness to answer the questions despite the fact that he would be infringing Swiss law. Where the party requesting the application of foreign laws to avoid production is an actual party to the litigation, the decision in *Comaplex* will apply. The court distinguished *Frischke* on the grounds that the bank was only a limited party, in that it had no interest in the actual result of the litigation. In *Comaplex* the party had a direct and substantial interest in the result. As such, the bank could not use foreign confidentiality laws to insulate them from disclosure. The court decided that foreign laws would only be considered when it becomes necessary to sanction an individual who chooses to withhold information. At that time, a party may adduce evidence of foreign laws that prohibit it from answering or producing relevant information.

A court will also disregard foreign confidentiality laws if a party could not be subject to prosecution under them. The Ontario Court of Appeal in *Re Spencer and the Queen*[94] dealt with whether a foreign confidentiality law could insulate a person from disclosing relevant information at trial. In *Spencer,* the accused was charged with an offence under the Income Tax Act. The Crown sought to call as a witness an employee of the Royal Bank of Canada who, while residing in Canada, was at the relevant time the bank manager for a branch in the Bahamas. The bank manager answered several questions but refused to answer any questions concerning transactions at the Bahamian branch of the bank on the ground that disclosure of the information requested could expose him to a criminal prosecution in the Bahamas. Section 10(1) of the Bank and Trust Companies Regulation Act 1965 (Bahamas), provides that a bank employee shall not, without the express or implied consent of the customer concerned, disclose to any person any information relating to the identity, assets, liabilities, transactions or accounts of a customer. Contravention of any of the provisions of section 10(1) constitutes a summary conviction offence.

The court decided that whether or not the witness would be exposed to liability in the Bahamas for his testimony in a Canadian court he was still required to testify concerning his knowledge of the transactions. The bank manager was a compellable witness in Ontario and was not being forced to give evidence in breach of any penal laws in Canada. The court held that in this case the witness would not be violating Bahamian law. The court decided that it was a part of the law of the Bahamas that criminal law is territorial in nature and is not intended in the absence of explicit words to the contrary to cover conduct that takes place outside the territorial

93 *Comaplex Resources International Ltd v Schaffhauser Kantonalbank* (1990), 42 CPC (2d) 230.
94 (1983), 145 DLR (3d) 344 (Ont CA), aff'd (1985), 21 DLR (4th) 756 [*Spencer*].

jurisdiction of the enacting body. The Bahamian legislation in *Spencer* did not state in any terms that it was to have extra-territorial effect. Because the Bahamas law would not apply to the witness, he was compelled to give the answers the Crown requested.

Production for foreign legal proceedings

[4.9] There are a number of blocking statutes in Canada that prohibit the removal of documents from Canada to a point outside Canada for the purpose of complying with an order, direction, or summons from a foreign court. Amongst these statutes are the Ontario Business Records Protection Act,[95] the Canada Evidence Act,[96] and the Foreign Extraterritorial Measures Act.[97] Each of these acts have numerous exceptions that would allow a foreign plaintiff or defendant to gain access to business records.

The Ontario *Business Records Protection Act*, while being a relatively inconspicuous piece of legislation, provides very clear language against removing business records from Ontario even when required by a foreign court order. The exceptions to the removal of business documents are limited to parent companies, securities regulation, and under the authority of other laws of Ontario and Canada:

> 'Business records not to be taken from Ontario
> (1) No person shall, under or under the authority of or in a manner that would be consistent with compliance with any requirement, order, direction or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario, unless such taking, sending or removal,
> (a) is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organisation outside Ontario material relating to a branch or subsidiary company or organisation carrying on business in Ontario;
> (b) is done by or on behalf of a company or person as defined in the Securities Act, carrying on business in Ontario and as to a jurisdiction outside Ontario in which the securities of the company or person have been qualified for sale with the consent of the company or person;
> (c) is done by or on behalf of a company or person as defined in the Securities Act, carrying on business in Ontario as a dealer or salesperson as defined in the Securities Act, and as to a jurisdiction outside Ontario in which the company or person has been registered or is otherwise qualified to carry on business as a dealer or salesperson, as the case may be; or
> (d) is provided for by or under any law of Ontario or of the Parliament of Canada.'[98]

95 RSO 1990, c B.19.
96 RSC 1985, c C-5.
97 RSC 1985, c.F-29.
98 RSO 1990, c B.19, at section 1.

The leading case dealing with section 1 of the Business Records Protection Act is *Republic of France v De Havilland Aircraft of Canada Ltd and Byron-Exarcos.*[99] In this case a company which acted as agent for De Havilland in various transactions, filed a complaint in France accusing Byron-Exarcos of misappropriating commissions payable from De Havilland to it for its personal use while Byron-Exarcos was managing its affairs. The French court issued letters rogatory requesting that the competent Canadian authorities assist with respect to preliminary investigations into the complaints. The Department of Justice, acting on behalf of the Republic of France, applied under section 46 of the Canada Evidence Act for an order directing the taking of commission evidence.[100] At the court of first instance, the order was granted by Mr Justice Eberle. De Havilland applied to have the order set aside. At the hearing, the court set aside the order on the grounds that section 46 of the Canada Evidence Act requires that the evidence sought be in relation to a civil, commercial or criminal matter pending before the foreign court, that the proceedings in the French court were similar to a police investigation in Canada and that there was no criminal charge pending in France. The Republic of France appealed to the Ontario Court of Appeal. At the appeal, the court held that section 46 did apply and that De Havilland was forced to provide oral evidence.

In coming to their decision, the Court of Appeal addressed the issue of whether section 1 of the Business Records Protection Act applied:

> 'The applicability of this section is doubtful. The order made by Eberle J. is not an order, direction or subpoena emanating from a jurisdiction outside of Ontario. I am also inclined to the view that s 46 of the Canada Evidence Act triggers the exception set out in s 1(d). It is not, however, necessary to determine, on this appeal, the applicability of s 1 of the Business Records Protection Act to the documents requested, as I am satisfied the section is no bar to the order for commission evidence. Its application, if any, to any of the documents ordered produced is best determined by the Commissioner, should De Havilland contend that any of the documents are protected by the section. I am satisfied that the order requested will not compromise any federal or provincial statute.'[101]

The Ontario Court General Division had the opportunity to comment on this decision in *De Havilland* in *Germany (Federal Republic) v Canadian Imperial Bank of Commerce.*[102] In so doing, the court discussed section 1 as it related to business records. In *Canadian Imperial Bank of Commerce*, Germany through letters of request for judicial assistance, sought an order for the production of documents by and the attendance for examination of CIBC. The evidence was sought to assist in

99 *France (Republic) v De Havilland Aircraft of Canada* (1991), 3 OR (3d) 705, at 718–19 [*Republic of France*].

100 Section 46, at the time read:
'46. Where, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal of competent jurisdiction in the Commonwealth and Dependent Territories or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or his discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.'

101 *Republic of France,* above note 99, at 712.

102 (1997) 31 OR (3d) 684 (Gen Div) [*Canadian Imperial Bank of Commerce*].

the criminal investigation of another individual who was alleged to have engaged in a fraudulent scheme in Germany. The court decided that where letters rogatory relate to foreign criminal matters, they are exclusively governed by section 46 of the Canada Evidence Act. The court determined that the perquisites for section 46 were met and thus CIBC would have to produce the documents requested. In discussing section 1 of the Business Records Protection Act, the court adopted the statements made by the Ontario Court of Appeal in *De Havilland* as they related to section 46 of the Canada Evidence Act meeting the exception set out in section 1(d).

Thus, it is very clear that the provisions of the Business Records Protection Act are not contravened where an Ontario order facilitating production of documents in a foreign proceeding is made.

It is also doubtful that the Act would be applied to the voluntary compliance with a foreign order, direction or subpoena where only a copy of the record is provided as opposed to the original record.

Domestic confidentiality and letters of request

[4.10] A party to a foreign proceeding seeking assistance from a Canadian court to enforce a request for an examination and production of documents from a Canadian resident who is a non-party to the foreign proceeding must obtain letters rogatory from the competent court of the foreign jurisdiction in which the proceeding is pending. The party seeking assistance must then apply to a court in the Canadian resident's province to enforce the letters rogatory.[103]

Generally, an application to enforce letters rogatory is brought under section 46 of the Canada Evidence Act[104] and section 60 of the Ontario Evidence Act.[105] In determining whether to grant an order to enforce letters rogatory issued by a foreign court, a judge at first instance has a wide discretion.[106] The court in exercising its discretion as to whether or not to enforce letters rogatory may place terms and conditions on the enforcement if it is of the opinion that such terms or conditions are necessary to do justice.[107]

In determining whether to enforce the letters rogatory the court must balance international comity against public policy and sovereignty:

> 'It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to public policy of the jurisdiction to which the request is directed …'[108]

103 Letters rogatory are not required where the Ontario resident from whom evidence is sought consents to provide the requested evidence or testimony.

104 RSC 1985, c C-5.

105 RSO 1990, c E-23. Both the Canada Evidence Act and Ontario Evidence Act govern the enforcement of letters rogatory. While not entirely in agreement, the majority of cases hold that both statutes are equally applicable to civil proceedings and, as such, applications to enforce letters rogatory may be made under both the federal and provincial statutes: *Re Mulroney et al and Coates et al* (1986), 54 OR (2d) 353, at 358 (HC).

106 See *Re Fecht v Deloitte & Touche* (1997), 32 OR (3d) 417 (CA), at 418 [*Fecht*] and *Pecarsky v Lipton Wiseman Altbaum & Partners*, [1999] OJ No 2004, at para 13 [*Pecarsky*].

107 *Pecarksy*, *ibid*, at para 37.

108 *R v Zingre*, [1981] 2 SCR 392, at 401 [*Zingre*].

The court will not enforce a foreign request for production of evidence if it would be contrary to public policy of the jurisdiction or if it would be otherwise prejudicial to the sovereignty or citizens of the jurisdiction.[109] The test of whether the foreign request imposes any limitation or infringement on Canadian sovereignty includes an assessment of whether the evidence is necessary for justice to be done between the parties to the foreign action, and whether the request would impose an undue burden on, or undue prejudice to, the person whose evidence is requested.[110] In this regard, the court may have regard to procedural principles in the province in which the application is being sought. For example, many provinces narrowly restrict examination for discovery to a party to an action, and only allow examination of non-parties with leave of the court. As such, a Canadian court can determine whether the request would violate relevant provincial laws, or infringe on Canadian moral or legal principles.[111]

The following is a non-exhaustive list of factors that a court will consider when determining whether to give effects to letters rogatory[112]:

(1) the evidence sought is relevant;
(2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;[113]
(3) the evidence is not otherwise obtainable;
(4) the order sought is not contrary to public policy; and
(5) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do were the action to be tried in Ontario.

In addition, courts have also refused to give effect to letters rogatory when the foreign request was vague, broad or when the main purpose of which was to serve as a fishing expedition.[114]

The limitation in *Zingre* with respect to only enforcing letters rogatory when they do not infringe upon any aspect of national interest applies primarily in cases where the enforcement of the letters rogatory would give extraterritorial effect to foreign laws in violation of Canadian or provincial sovereignty, or where the foreign request is expressly prohibited by Canadian legislation.[115]

What law governs issues of privilege and confidentiality?

[4.11] In Canada, matters of procedure are governed by the *lex fori*.[116] However, the line between what is substantive and what is procedural is often unclear. The Supreme Court of Canada has held that where there is a doubt if a law is procedural

109 *Fecht*, above note 106. Also see *Taft v Siemens Electric Ltd* [2000] OJ No 103, at para 11 [*Taft*].
110 *Fecht,* above note 106.
111 *Republic of France*, above note 99, at 718–19.
112 *Friction Division Products v EI Dupont de Nemours (No 2)* (1986), 56 OR (2d) 722, at 732.
113 Subsequent case law has confirmed that letters rogatory for pre-trial proceedings can be enforced, notwithstanding these criteria. See for example, *Zingre*, above note 108; *Fecht v Deloitte & Touche* (1996), 47 CPC (3d) 165 (Ont Gen Div), aff'd (1997), 15 CPC (4th) 293 (Ont CA). In *Pecarsky,* above note 106, at para 13, Nordheimer J provided that in cases when the letter of request is directed to pre-trial discovery, rather than to evidence for trial, a higher hurdle must be overcome to satisfy the court that it is desirable that the letter of request be enforced.
114 *Fecht,* above note 106; *Pecarsky,* above note 106; and *Taft,* above note 109.
115 *Zingre*, above note 108.
116 *Tolofson v Jensen* [1994] 3 SCR 1022, at paras 76–77.

or substantive for a conflict of laws analysis, the doubt should be resolved by holding that the law is substantive.[117]

Courts have suggested the proper test to determine if a rule is substantive is to determine whether the foreign rule would be too inconvenient to apply. If the answer is negative, the foreign rule is substantive.[118]

It appears that in the context of a conflict of laws analysis most issues of privilege and confidentiality may be considered procedural and thus governed by the law of the forum.[119]

The implied undertaking rule is codified in Ontario's Rules of Civil Procedure. Additionally, it has been described as a judge-made procedural law arising from the inherent jurisdiction of the court to control it own process.[120] This supports the argument that the implied undertaking rule is a procedural rule and thus governed by the law of the forum.

Questions of whether a witness can claim privilege has been found to be governed by the *lex fori*.[121]

In *Oilworld Supply Co v Audas*, Justice Campbell stated that it is well established that 'questions as to admissibility of evidence, compellability and privilege are matters of procedure governed by the law of the *lex fori*'.[122]

This is consistent with the British approach. In English proceedings, whether or not a document is privileged is to be determined by English law. The fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant.[123] Additionally, in Britain questions of whether a witness can claim privilege appear to be governed by the *lex fori.*[124]

However, it is possible that not all issues of privilege will be governed by the *lex fori*. Courts have found solicitor–client privilege to be a substantive rule of law.[125] Although these findings were not made in the context of a conflict of laws analysis it is possible that solicitor–client privilege could be found by a Canadian Court to be a substantive right governed by the *lex causae* or by the law applicable to the particular solicitor–client relationship especially given the Supreme Court of Canada's comments in *Tolofson* that doubt should be resolved by holding that the law is substantive.

117 *Ibid*, at paras 78–79.
118 *243930 Alberta Ltd v Wickham*, [1990] OJ No 1781, at para 9.
119 *Oilworld Supply Co v Audas*, [1985] BCJ No 1472, at para 20 [*Oilworld*]; *Circosta et al v Lilly*, [1967] 1 OR 398, at para 11.
120 National Gypsum, above note 14, at 692.
121 JG Castel, J Walker, *Canadian Conflict of Laws*, 6th ed (LexisNexis Butterworths, 2005), at 6–5.
122 *Oilworld*, above note 119, at para 20.
123 AV Dicey, JHC Morris, L Collins, *Dicey and Morris on the Conflict of Laws,* Third Cumulative Supplement to the 13th ed (London, Sweet & Maxwell 2003), at 7-014; *Bourns Inc v Raychem Corp* [1999] CLC 1029 (CA).
124 AV Dicey, JHC Morris, L Collins, *Dicey and Morris on the Conflict of Laws*, 13th ed (London, Sweet & Maxwell 2000), at 7-024.
125 *Fullowka v Royal Oak Mines Inc*, [1998] NWTJ No 73, at para 22; *Nightengale Galleries Ltd v Director of Theatres Branch* (1984), 48 OR (2d) 21, at para 34; *R. v Abeyewardene*, [2008] OJ No 5749, at para 11; *Maranda v Richer*, [2003] 3 SCR 193, at para 12.

Conclusion

[4.12] The litigation process creates many risks that confidential information will be released to the world. Documents filed with the court and courtroom proceedings are all subject to an open court principle which makes the litigation process as open as possible to ensure that the public will have confidence in the proper administration of justice. While this principle is of extreme importance, the legislatures and the courts have recognised the importance of ensuring the protection of confidential information in appropriate cases. Without the protections afforded in the legislation and common law, parties would be less likely to produce relevant documents or information for fear of improper use. On the other hand, the unrestrained granting of protective orders could seriously hamper the ability of an opposing party to craft their defence or claim and could undermine the confidence of the public in the administration of justice.

While a party who wishes to protect confidential information may rely on confidentiality orders, protective orders, closing of court proceedings, or even the implied undertaking rule, there are still many gaps in the protection that is afforded and the availability of relief cannot be guaranteed in advance.