



Deemed Undertaking Rule Applies To Video Evidence In Civil Action: Rule Not Lifted



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Chet Wydrzynski and Renata Antoniuk of our Toronto office were recently successful in opposing a motion for the production of CCTV footage disclosed during pre-trial discovery in a civil action for the purported purpose of pursuing a criminal prosecution against a number of defendants.¹

In 2013, the Plaintiff attended a shopping plaza. He was asked to leave by security. During a subsequent arrest, the Plaintiff alleged that he was assaulted by two security guards. The incident was captured on CCTV. In 2015, the Plaintiff, his sister and parents commenced a multi-million-dollar civil action in relation to the alleged assault against the security guards, the security guard company and the plaza.

On the motion, the Court had to determine whether the deemed undertaking rule applied to the video. This rule prevents parties involved in litigation from using documents disclosed in litigation for ulterior purposes. It is codified in Rule 30.1 of the *Rules of Civil Procedure* and exists at common law.

The video was provided by defence counsel, Dolden Wallace Folick partner, Morgan Martin, to Plaintiffs' counsel in advance of serving an affidavit of documents as a result of a request by the Plaintiffs' then counsel and also so that consideration could be given to adding a police force as a further party defendant. Mr. Martin first spoke with Plaintiffs' counsel and advised that he would producing the video to streamline the litigation process and that the video would eventually be included as a non-privileged document in the Defendants' affidavit of documents. This discussion was supported by a contemporaneous telephone memorandum.

In his ruling, Justice Richard A. Lococo agreed with our position that the deemed undertaking rule applied to the video. In arriving at his decision, Lococo J. acknowledged that the video was a key item of documentary evidence and relevant to the civil assault action. As a result, disclosure of the video was required under the *Rules*. He further ruled that "the timing of a

¹ *Longo v Tricom Security Services Inc*, 2020 ONSC 4160.



particular document's disclosure during the disclosure process ... is not a determining factor as to whether the deemed undertaking rule applies to the document".

In addition, to determine whether the deemed undertaking rule applied, *Lococo J.* had to determine whether the Plaintiffs should be granted relief from the deemed undertaking rule. In this regard, the Court can grant leave from the deemed undertaking where the interest of justice outweighs the prejudice that would befall a party who disclosed the evidence.

The Plaintiffs argued that the interest of justice in pursuing a criminal investigation into the conduct of security and police outweighed any prejudice to the shopping plaza defendant who owned the video. We argued that the criminal investigation as leverage in the civil action, including in any settlement discussions. Case law has recognized that the investigation of potential criminal conduct is not determinative of this issue. The Plaintiffs were not successful in arguing that a criminal investigation could not be commenced without the video. While the *Lococo J.* agreed that the shopping plaza defendant would not itself be in criminal jeopardy as a result of disclosure, the Plaintiffs pled that the shopping plaza defendant was vicariously liable for the security guards' actions. Canadian courts have already recognized that there are tactical advantages to seeking a police investigation and *Lococo J.* held that this potential prejudice outweighed the public interest in this case, particularly given that seven years had already passed since the date of the incident giving rise to the civil action.

Take Away

This case confirms that the deemed undertaking rule is not limited to documents contained within an affidavit of documents. It applies to protect documentary disclosure between parties throughout the litigation process. The rule will only be modified or varied in exceptional circumstances and the potential for a criminal investigation is not determinative of the issue.

Defence counsel, adjusters and insurers should consider the potential implications of early disclosure, even where it may be prudent to do so absent a written agreement on the particular use of the documents disclosed.

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