The Illusory Shield: The Collateral Use of Information in Civil and Regulatory Proceedings

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The scope of disclosure in both civil and administrative proceedings is currently a hot topic of debate. Some call for limitations on the broad discovery process, while others favour broad disclosure obligations, enhanced by the plethora of sources now available in the electronic era.

Within this debate emerge issues respecting the use of information obtained by a party in the course of a regulatory proceeding in a subsequent or co-existing civil action and, similarly, the use which can be made of information obtained in a civil action to initiate and/or advance a regulatory proceeding. Compelling arguments can be advanced by both sides as to whether it is appropriate to permit the collateral use of such information. For example, plaintiffs will argue that information obtained in the course of an action which warrants action being taken by regulatory body for the protection of the public should be available for such use. Similarly, information obtained by a complainant in a regulatory proceeding should be available to advance a civil action against the professional. Conversely, compelling arguments can be advanced on behalf of professionals who are compelled to produce information as a result of a mandatory process that such information should not be used against them in other proceedings.

Use of Information From Complaints/Regulatory Bodies in a Civil Action

The governing legislation for many regulatory bodies prohibits the subsequent use of information and documentation that has been generated or disseminated in the regulatory proceeding. The three examples below illustrate the nature and extent of the protection afforded to certain professions.

(a) Regulated Health Professions

The *Regulated Health Professions Act*[2] provides a scheme for, the investigation of complaints made by members of the public against its members. Integral to the scheme is subsection 36(3),which provides that no report, document or thing prepared for a proceeding under the Act may be used in a civil proceeding, other than a proceeding under the Act.

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2 S.O. 1991, c. 18 ("RHPA").

The courts have repeatedly refused to readdress the breadth of s.36's effect. In *M.F. v. Sutherland*,[3] the Ontario Court of Appeal made it abundantly clear that section 36(3) must be considered an "absolute prohibition" against the use of information from a College of Physicians Surgeons of Ontario (CPSO) complaint in a subsequent civil proceeding. The Court of Appeal recently affirmed the strict application of this rule and prohibited the use of complaint documents in an application for pre-action documentary discovery.[4] The rationale behind such a stringent rule is to promote full and frank disclosure and an efficacious investigation.

In the past, a distinction was drawn between the disclosure/production of regulatory documents at the discovery stage and this admissibility at trial. However, this distinction was recently rejected by the Ontario Divisional Court in *Middleton v. Sun Media Corp,*[5] where the Court concluded that there is no requirement to list CPSO documents in a party's affidavit of documents, since s. 36(3) of the RHPA prohibits the "use" of the documents in civil proceedings.

(b) Law Society of Upper Canada

The *Law Society Act*[6] provides a similar process by which the self-governing body may investigate complaints respecting a member's conduct and take action on the basis of the findings made. Section 49 prohibits the disclosure by any representative of the Law Society of Upper Canada (LSUC) of any information that comes to his knowledge as a result of an audit, investigation, review, search, seizure or proceeding under the Act.[7] Similarly, LSUC representatives cannot be compelled to testify or produce documents in any proceeding, except for proceedings under the Act.

Notably, the prohibition under the *Law Society Act* is not as stringent as it may first appear. Section 49.13(1) provides a mechanism for the LSUC to apply to the Court for an order authorizing disclosure to a public authority of any information that the LSUC representative is otherwise prohibited from disclosing. However, the Court shall not make an order under this section if the information sought to be disclosed came from an oral or written statement that may tend to incriminate the person or establish the person's liability in civil proceedings. There is thus a built-in right to protection against self-incrimination.

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3 (2000), 188 D.L.R. (4th) 296 (C.A.).

4 *Meuwissen (Litigation Guardian of) v. Strathroy* Middlesex General Hospital, [2006] O.J. No. 5082 (C.A.).

4 [2006] O.J. No. 1640 (Div. Ct).

5 R.S.O. 1990 c. L.8, as amended.

6 *Ibid,* s. 49.12.

(c) Engineers

Similarly, the *Professional Engineers Act*[8] provides a mechanism for investigating complaints from the public. Section 38 provides for confidentiality of the proceedings under the Act and also prohibits the production of the information disclosed therein in any other proceeding and incorporates a monetary penalty for contravention of this provision.

In *Watson v. Boundry,*[9] Boland J. was required to determine the effect of the confidentiality provision in a subsequent civil action in which the nature of the complaints investigation itself was at issue. A complaint against Watson made to the Association of Professional Engineers – Ontario (APEO) was dismissed by its Complaints Committee. Watson, instituted complaints against two employees of the APEO as a result of their alleged role in launching the initial complaint. Watson's complaints were also dismissed. Thereafter, Watson commenced an action against the two employees and the APEO, claiming damages for malicious prosecution, abuse of process and breach of statutory duty.

Watson argued that, in an action for malicious prosecution, where the very method of investigating, reviewing, and decision-making are at issue, it is imperative that the underlying facts be disclosed. Boland J. disagreed, noting that s. 38 is clear and unambiguous, prohibiting the defendants to produce anything obtained during the course of its investigation under the Act. Boland J. also noted that s. 38 expresses a clear intention on the part of the legislature to protect the investigation and deliberation process of professional regulatory bodies, so as to promote full and impartial investigation and to ensure the independence of investigators and decision-makers. Hence, to permit questions on discovery canvassing these areas would be to undermine the purpose of the section.

Further, in *Niagara South Condominium Corp. v. J. David Pounder Ltd.,*[10] the APEO commissioned a report in its investigation of a complaint made by Niagara South Condominium Corp. against J. David Pounder Ltd. A portion of the report, and specifically, a summary of the findings made, was disclosed by the APEO to the parties to the complaint. A civil suit subsequently ensued, during the course of which the plaintiff brought a motion to obtain production of the report.

The Court was asked to determine: (i) whether the report was protected from production in the civil action by s. 38; (ii) if so, whether that protection was subordinate to an order for third party

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8 R.S.O. 1990, c. P.28, as amended.

9 (1997), 34 C.L.R. (2d) 248 (S.C.J.).

production pursuant to Rule 30.10 of the *Rules of Civil Procedure;* and/or (iii) whether that protection was subordinate to the Court's inherent jurisdiction to ensure all relevant documents are before it. Quinn J. held that the report was shielded from production by virtue of s. 38, which superseded both the discovery obligations in the *Rules* and the Court's inherent jurisdiction. In so doing, he adopted the reasoning of Boland J. in *Watson* that s. 38 clearly and unambiguously prohibits documentary production by the APEO, except in accordance with that section. Quinn J. rejected the plaintiff's arguments that the public interest ought to permit the complainant to know whether APEO's investigation process impeded a legitimate complaint. Quinn J. also rejected the plaintiff's argument that the voluntary disclosure by the APEO of part of the report obligated the APEO to make full production, noting it would be unfair to use the fact of permitted disclosure within the statute to justify production outside the statute.

(d) Protection for Regulators – The limits of litigation privilege

The decision in *Watson* may be contrasted with those instances in which no specific disclosure prohibition applies. The Supreme Court of Canada considered the issue of the litigation privilege applicable to regulatory prosecutions in *Blank v. Canada (Minister of Justice).*[11] The plaintiff faced numerous charges for federal regulatory offences, all of which were ultimately quashed. He subsequently sued the federal government for fraud, conspiracy, and abuse of its prosecutorial powers. Blank sought disclosure of the government's files pertaining to its investigation in the regulatory proceeding. The government refused to produce the files, citing litigation privilege. The Court noted that the purpose of litigation privilege is to create a "zone of privacy" around counsel's preparation for litigation in order to promote an unimpeded investigation. The purpose of the privilege, and hence the privilege itself, ends when the proceeding ends. The Court held that Blank was entitled to substantive production so that he might determine how the government had prepared its case against him. As such, where there is no legislated protection for the investigatory process, any protection afforded during the course of a regulatory proceeding will not extend beyond the life of the proceeding itself.

The Deemed Undertaking Rule and Subsequent Regulatory Proceedings

Rule 30.1 of the *Rules of Civil Procedure* imposes upon parties and their counsel an undertaking not to use evidence or information obtained through the discovery process for purposes other than those of the proceeding in which it is obtained.

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10 (1998), 40 C.L.R. (2d) 173 (Ont. Gen. Div.).

11 2006 SCC 39.

Parties may seek relief from the deemed undertaking rule where "it is necessary in the interests of justice".[12] This process of granting relief from the deemed undertaking rule does raise some issues respecting the tension between the rights of a litigant when faced with the broad - and largely unprotected - obligations of discovery in civil proceedings.

In *755568 Ontario Ltd. v. Linchris Homes Ltd.,*[13] Granger J. was required to weigh the fundamental right against self-incrimination as against the public interest. The plaintiff sought leave to provide discovery transcripts to the police, alleging that the transcripts provided reason to believe that some or all of the defendants committed a criminal offence. Granger J. held that the public interest in the investigation of possible crimes is not a sufficient ground *per se* to relieve counsel of the deemed undertaking rule. Granger J. inferred that the plaintiff actually hoped the police investigation would uncover additional information that might assist in the prosecution of the action and/or that the investigation might force the defendants to make an offer to settle, which he deemed to be clearly improper motives. The plaintiff was denied leave to disclose the transcripts to the police.

Similarly, in *Colourtech Painting Ltd. v. Toh,*[14] the applicant was denied leave to report to the Canada Revenue Agency information obtained in the discovery of the defendant. The applicant argued that the defendant had perpetrated fraud in reporting to CRA, which thus warranted a breach of the implied undertaking rule. The court found the plaintiff's purpose in seeking to disclose the information was to pressure the defendant to settle, which was deemed an improper purpose and collateral to the civil action. The possible ramifications of an investigation into the unpaid taxes were much broader, engaging the defendant's right against self-incrimination.

Conversely, in *Shred-Tech Corp. v. Viveen*,[15] Gordon J. granted leave to the defendants to make use of information obtained in the discovery process to bring complaints under the PIPEDA and the *Private Investigators and Security Guards Act* regime against investigators hired by the plaintiff. The investigators had allegedly obtained personal information pertaining to the defendant corporation, absent the consent of the defendant or a court order. The intended use of the information was for a legitimate exercise, not an improper purpose.

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12 Rule 30.1(8).

13 (1990), 1 O.R. (3d) 649 (Gen. Div.).

14 [2000] A.J. No. 1345 (Q.B.).

The decision in *Shred-Tech* does raise issues regarding the notion of fairness in balancing the competing rights of disclosure and the rights against self-incrimination. It seems profoundly unfair that a party forced to disclose information in the course of a civil proceeding may face criminal, quasi-criminal, or regulatory sanctions as a result of that mandatory disclosure. Certainly, these types of exceptions to the deemed undertaking rule create a risk that parties may withhold information in the course of a civil proceeding for fear of sanction. The importance of full and frank disclosure in a proceeding, together with the administration of justice, require protection of the confidential nature of the documents and information produced during the discovery process.

However, there is a subtle distinction between the facts of these cases which may account for the divergent decisions. In *Colour-Tech*, the Court was clearly unimpressed by the plaintiff's motive in attempting to report information concerning the defendant to the CRA – that is, to have the defendant's tax account assessed, with a view to pressuring the defendant into a settlement. The same appears to be true in *755568 Ontario Ltd.* In contrast, the plaintiff in *Shred-Tech* sought to use the information to launch a complaint against the investigators who had allegedly acted improperly during the course of their investigation. The motive behind the request in the latter was viewed as more genuine and not designed to gain some strategic advantage by the party seeking to use the information.

Conclusion

In the face of competing public interest and privacy concerns, both the legislators and the judiciary have made attempts to balance the obligations that flow from being a party to a civil or regulatory proceeding against the need to protect the information disclosed and the integrity of the process itself. Where the underlying statutory framework for a regulatory body limits the use which can be made of the information outside of that regulatory proceeding, the Courts have consistently upheld those statutory prohibitions.

Within regulatory proceedings, the collateral use of information produced is generally prohibited. There are solid policy reasons for the protection of disclosure in regulatory proceedings. A consistent cloak of confidentiality is required for full and frank disclosure, which is imperative to ensuring an effective investigation.

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15 [2006] O.J. No. 4893 (S.C.J.).

In civil proceedings, the deemed undertaking rule generally prohibits parties from making collateral use of the information obtained therein. However, there is an exception applicable where the disclosure is necessary in the interests of justice. Litigants and their counsel who seek an exception from the deemed undertaking rule must bring the motion before making any collateral use of the information. To grant retroactive relief from the deemed undertaking rule would make a "mockery of the undertaking" and would encourage the attitude among litigators that "it is easier to ask for forgiveness than permission".[16]

It appears that a key factor in determining the success of these motions is the extent to which the intended use of the information is connected to the proceedings in which disclosure is made. Where the two sets of proceedings involve the same or similar parties and the same or similar issues, leave will most readily be granted. There must be some proper and legitimate purpose for seeking this type of relief and not merely to coerce a party into a settlement. The legitimate privacy rights of party to a civil or regulatory proceeding needs to be protected. The collateral use of documentation or other information, as a general rule, should not be permitted except in clear and compelling cases where such disclosure is required for the proper administration of justice.

16 *Jones v. Campbell,* [2000] O.J. No. 3153 (Master MacLeod)