CITATION: Grid Link Corp. v. Foglia et al, 2023 ONSC 2014
COURT FILE NO.: CV-20-0440-000
DATE: 2023-03-29

2023 ONSC 2014 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Grid Link Corp.	*E. Zablotny*, for Plaintiff responding party
Plaintiff	
- and -	
Sebastiano Foglia, Daniel Mason, Ian Michael Staal, Staal Irrigation Incorporated and Staal Utility Inc.	*N. Wainwright,* for Defendants moving party
Defendants	
	HEARD: March 22, 2023, at Thunder Bay, Ontario

Mr. Justice F. Bruce Fitzpatrick

Decision On Motion

[1] The defendant Sebastiano Foglia ("Foglia") and the defendants Ian Michael Staal, Staal Irrigation Incorporated and Staal Utility Inc. (these three defendants collectively "the Staals") move to dismiss or permanently stay the plaintiff's action. Foglia and Stall submit that the plaintiff Grid Link Corp intentionally breached the common law deemed or implied undertaking rule. Grid Link resists; it submits that there was no breach, but if I find a breach, then by cross motion, it seeks relief from the consequences of the breach.

[2] In the course of argument, I told counsel that I was going to deal first with the issue of breach and leave the question of remedy to another day, should a breach be found. Argument proceeded on that basis.

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Background

[3] In this action, Grid Link sues Foglia, who formerly was one of its executives and who still retains a minority shareholder, and the Staals, and others for allegedly misappropriating millions of dollars. The action has been discontinued against the defendant Daniel Mason.

[4] The parties to this action were involved in a matter at the Ontario Labour Relations Board that started in May 2020 (the OLRB Matter) and went on for some time. The ORLB Matter was commenced by a trade union, the International Brotherhood of Electrical Workers Local 602.

[5] In May 2020, the Union commenced a related employer/sale of a business application against the Staals and named Grid Link as a co-respondent. The Union holds bargaining rights for Grid Link's employees, and the Union sought to extend those rights to employees of the Staals. The Union relied on the section 69 sale of business provisions of the *Ontario Labour Relations Act*.[1]

[6] In August 2020, the Board made a production order. The production order in the OLRB Matter required the Staals to produce approximately 15,000 pages of documents to the Union and to Grid Link. On this motion and cross-motion, these documents were Exhibited K an affidavit of Ian Staal sworn February 9, 2022.

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[1] 1995 S.O. 1995 c. 1 Sched A. as amended.

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[7] The hearing at the OLRB began on February 24, 2021. It continued for eleven non consecutive days and concluded eight months later on September 9, 2021. During the hearing, 240 documents were proffered as exhibits. The majority of the documents were proffered by Grid Link. The Board released its decision on January 23, 2023.[2]

[8] In this action, Foglia and the Staals assert that Grid Link breached the common law deemed or implied undertaking rule by using the documents from the OLRB Matter to assist in commencing the action.

[9] The timeline of certain events relevant to a consideration of this matter were not disputed by the parties. It was as follows;

- January 20, 2020, Grid Link's lawyers send a "cease and desist" letter to the Staals.
- May 19, 2020, the Union commences the OLRB Matter.
- May 29, 2020, Grid Link provides a detailed response to the OLRB Matter.
- July 30, 2020, the OLRB gives direction about redactions of documents to be produced.[3] The Union unsuccessfully suggests a confidentiality order.
- August 25, 2020, the OLRB orders the Staals to produce documents previously requested by the Union.[4]
- December 17, 2020, Grid Link issues its statement of claim (Subsequently, the pleading was amended).

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[2] *International Brotherhood of Electrical Workers Local 402 v. Grid Link Corp.*, 2023 CanLII 8277 (ONLRB).
[3] *Grid Link Inc.* [2020] O.L.R.D. No. 1969.
[4] *Grid Link Inc*. [2020] O.L.R.D. No. 2217.

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The Law

[10] There was no dispute between the parties that the documents in the OLRB Matter were subject to the common law deemed or implied undertaking rule. Counsel for both parties referred the court to the decision of the OLRB in *Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America v. NLG 2011 Inc. c.o.b. as Nautical Lands Group and/or Nautical Lands General Contracting Inc*.[5] The scope of the deemed or implied undertaking at the OLRB is not discussed in that decision other than a “one liner” from Vice Chair Seveny or who stated: “The parties are reminded of the deemed undertaking rule with respect to all documents produced”.

[11] In a more recent decision of the OLRB, *The Building Union of Canada v. Labourers' International Union of North America*,[6] Vice-Chair Shouldice stated at paragraph 29:

> 29. The Board summarized the application of the implied undertaking rule in *Tiercon Corp.*, 2010 CanLII 74590, at paragraph 249:
>
> > There is an implied undertaking applicable to parties to a Board proceeding that they will not use any documents produced in that proceeding in any other Board matter, unless those documents are otherwise legitimately available outside of the litigation process. That limitation on the use of documents produced by parties to litigation makes sense and is justifiable (see, for example, the discussion of this limitation in civil proceedings in *Goodman v. Rossi*, (1995), 1995 CanLII 1888 (ON CA), 24 O.R. (3d) 359 (OCA)). However, once a document produced by one party to another as part of pre-hearing production in a Board proceeding becomes an exhibit at a Board hearing, the implied undertaking ends (see *Maxi*, [1998] OLRB Rep. May/June 448, at paragraph 13, and *Marsil Mechanical Inc*., Board File 3591-98-G, unreported decision dated July 9, 1999, at paragraph 35). The disclosure of the document in a public forum usually precludes any ongoing need for confidentiality.

[5] 2016 CanLII 74122 (ON LRB).
[6] 2020 CanLII 86655 (ON LRB).

[12] The leading decision of the Supreme Court of Canada about the deemed or implied undertaking at common law is *Juman v. Doucette*.[7] The case came out of British Columbia. In that province at the time of the *Juman* decision, there was no formal enacted rule recognizing the existence or scope of the common law deemed or implied undertaking rule as there has been in Ontario since 1996 when Rule 30.1 was added to the *Rules of Civil Procedure*.

Position of the Parties

[13] The moving party defendants argue there is no question that a breach of the common law deemed or implied undertaking occurred. The defendants point out that during the cross examination of Grid Link's deponent, Grid Link's corporate counsel, it was admitted that the documents (Exhibit "K") were used to prepare the statement of claim. During that cross-examination, Grid Link's counsel stated that the deemed undertaking rule did not apply because Grid Link expected that the documents would be exhibited during the OLRB matter, but the moving party defendants argued that this just proves the breach. They argued that but for the production of the documents, Grid Link would not have had the confidence to bring forward this action. The moving party defendants argue the only remedy for this breach is to have the matter stayed or dismissed. In the alternative, the moving party defendants propose an order go prohibiting use of the documents at trial. In any event, the moving party defendants argue the breach entitles them to costs of this motion on a substantial indemnity basis regardless of the disposition of the motion.

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[7] 2008 SCC 8.

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[14] Grid Link admits it used the documents in preparing the claim. However, Grid Link argues that prior to having received the documents, it had fully intended to sue and had the requisite particulars to plead its claim without resort to the documents. Grid Link says that its cease and desist letter in January 2020, demonstrates that it knew all it needed to know to commence an action without the documents. Further, Grid Link submits that its knowledge of the particulars of the claim is demonstrated by its detailed response to the OLRB Matter in May 2020, which response was given well before their receipt of the documents in the fall of 2020. Accordingly, Grid Link submits that there was no breach of the deemed or implied undertaking.

[15] In the alternative, Grid Link argues that the moving party defendants have demonstrated no prejudice from Grid Link's use of the documents to prepare its pleading. The documents are not specifically referenced in the claim. Further, the documents would have been produced in any event during the discovery process. Grid Link submits that the remedy of a stay or dismissal of its action sought by the moving party defendants is not in the interests of justice.

Disposition

[16] As I shall now explain, I shall be dismissing the defendant's motion; what happened in the immediate case is not caught by the common law deemed or implied undertaking.

[17] Rule 30.1 deals with the deemed undertaking in the context of civil litigation of matters in Ontario. Rule 30.1 states:

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RULE 30.1 DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) 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).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the

evidence or to information obtained from it, and may impose such terms and give such directions as are just.

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[18] The moving party defendants are not relying on this Rule to obtain the relief they seek on this motion. They argue that the common law as elucidated and discussed in *Juman* defines a broader scope of the nature and availability for remedy for breach of the deemed undertaking than that provided in Rule 30.1.

[19] In my view, and as discussed during oral argument, despite how the argument has been framed on this motion, the facts of this case raises the question as to whether or not Ontario Rule 30.1 should serve to be this Court's guide for resolving this particular dispute in the context of this action.

[20] In *Tanner v. Clark*,[8] in a decision that was affirmed by the Court of Appeal, Epstein J. writing for a three-judge panel of the Divisional Court differentiated between the "deemed undertaking rule" as provided for in Rule 30.1 and an "implied undertaking rule" which existed at common law. At paras. 32 through 34 she stated:

> [32] In 1996, the *Rules of Civil Procedure* were amended to provide for a deemed undertaking rule. Pursuant to rule 30.1, all parties and their counsel are deemed to undertake not to use evidence or information obtained through the discovery process for any purposes other than those of the proceeding in which the evidence was obtained.
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> [33] In the matter before us, as well as in authorities considering the rule since its promulgation, the suggestion has been made that Rule 30.1 is a simple codification of the implied undertaking rule recognized by the Court of Appeal in *Goodman v. Rossi* as part of the common law of this province. In fact, often the descriptors "implied" and "deemed" are used interchangeably. The problem with this approach is that the deemed undertaking rule is not a mere codification of the common law

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[8] 60 O.R. (3d) 304 (Div. Ct.), aff'd (2003) 63 OR (3d) 508 (C.A.).

> rule. In formulating rule 30.1, the Civil Rules Committee did not limit itself to merely codifying what had been decided in the case law. Instead, the Committee took the opportunity to refine the implied undertaking principle.
>
> [34] The rule is quite specifically worded. Rule 30.1.01(3) provides that "[a]ll parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the [page313] evidence was obtained." The rule provides for its application to limited circumstances. In this respect, rule 30.1.01(2) restricts the application of the rule to evidence or information obtained within the discovery processes referred to in rule 30.1.01(1). The rule does not apply to evidence or information otherwise obtained. The wording in subparagraph 3 makes it clear that the rule does not provide for a deemed undertaking with respect to evidence or information obtained in any process other than a proceeding governed by the rules.

[21] The comments in paragraph 33 of the *Tanner v. Clark* decision concerning “codification” should be considered along with a comment Binnie J. made in *Juman* at paragraph 39 where he stated: “the implied undertaking rule at common law, and in those jurisdictions which have enacted rules, more or less codifying the common law, is subject to legislative override.”

[22] In the immediate case, the question for me is whether what happened in the immediate case is within the “more or less” codification of the common law deemed or implied undertaking that came about by the enactment of Rule 30.1.01(2) in Ontario. In other words, is the demarcation of Rule 30.1.01(2) to govern the circumstances of the immediate case? Does the common law deemed or implied undertaking only become applicable to those express circumstances set out in Rule 30.1.01(1)(a)(i) through (iv) such that no relief is available in a civil proceeding for a breach unless the breach occurs in the enumerated categories in Rule 30.1.01?

[23] The decision in *Tanner* in paragraph 34 is clear that the undertaking does not apply to documents obtained from another proceeding. This decision, however, is difficult to reconcile

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with the comments made in the *Juman* decision which came much later and which do clearly set out the scope of the deemed undertaking rule. The later comments of Binnie J. would seem to favour the moving parties' position in the immediate matter.

[24] *Juman,* dealt with a situation where a party sought to prevent disclosure of discovery evidence from a civil matter to the police. In that decision, the Supreme Court gave guidance on general principles to be applied when a court is being asked to exercise its discretion in favour of a waiver of the deemed undertaking rule.

[25] In the immediate matter, no waiver was sought at first instance. Grid Link takes the position the deemed undertaking rule never applied or at least had expired or had been extinguished at the time it drafted its claim. Grid Link says this for two reasons. First, it argues the particulars set out in its reply to the Board Matter demonstrates it had sufficient particulars of the alleged claim against the defendants such that it did not breach the deemed undertaking once the Documents were received. Second, it says that its existing knowledge was manifested by way of the cease and desist letter of January 2020.

[26] At paragraphs 23 through 28 of *Juman,* the Supreme Court discusses the rationale for rules of court dealing with deemed undertaking. The necessary balance between litigants' privacy interests and the public interest in getting at the truth in a civil action is discussed. This balance provides that "[t]he answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone".

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[27] At paragraph 30 the Court recognized that exceptional circumstances may trump the deemed undertaking rule. Binnie J. stated:

> The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in Lac d'Amiante, at para. 77:
>
> Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
>
> In such an application the judge would have access to the documents or transcripts at issue.

[28] At paragraph 32 Binnie J. continued;

> An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

[29] At paragraph 35, Binnie J. discussed circumstances where material in one action is being sought in another action with the same or similar parties will generally lead to a conclusion that prejudice is virtually non-existent. At paragraph 36, he qualified this observation by stating, "[o]n 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."

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[30] At paragraph 38, Binnie J. directed that an applicant seeking a waiver bears the onus to demonstrate a superior public interest in disclosure and that the undertaking should only be set aside in exceptional circumstances.

[31] I repeat these comments because they stress the importance that litigants have in the privacy of their productions, and I do have a concern about how the documents came to be used in the immediate case. In the immediate case, I am not convinced by Grid Link's submissions that it did not need the documents and fully appreciated its claim against the defendants. I find that Grid Link used these documents and took them into account and then felt that it was appropriate to sue the defendants. Grid Link then entered the majority of the documents into evidence at the Board Hearing after they had used them for the purposes of the immediate case. I don't think this bootstrapping exercise does a lot to alleviate my concern with the chronology that tends to reveal that the deemed undertaking as it may existed before partial codification was breached in the immediate case.

[32] In my view, a better practice would have been to have raised the issue squarely with opposing counsel before the statement of claim was issued and sought consent to rely on the documents. It did not appear that there was any concern about running up against a limitation deadline in December 2020. While hindsight is always 20/20, it just seems to me this matter evolved in a grey area where a greater degree of transparency may have avoided this particular motion all together.

[33] Despite these concerns, I am bound by the decision in *Tanner*. *Juman* was focused on a British Columbia situation, but it did, in passing, recognize the codification of the deemed

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undertaking Rule in Ontario at the time. The comments of Binnie J. certainly speak to best practices where an unusual situation such as the one a bar presents. However, the decision in *Tanner* and the express provisions of Rule 30.1.01(2) lead me to the conclusion that I cannot grant remedy in this civil action for an alleged breach of the deemed undertaking rule in an unrelated proceeding in another forum as it did not occur in one of the enumerated circumstances of Rule 30.1.01, which has partially codified the common law's deemed or implied undertaking.

[34] The moving parties' motion is dismissed.

[35] This was a novel case. I understand why the defendants brought the motion. The facts arise in a grey area. Accordingly in my view in all the circumstances it does not call for an award of costs to either party.

"original signed by"
The Hon. Mr. Justice F.B. Fitzpatrick

Released: March 29, 2023

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DECISION ON MOTION

Fitzpatrick J.

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