# Examinations for Discovery (Part 2): I'll Take Your Refusal Under Advisement

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One of the most challenging and important aspects of conducting an examination for discovery is dealing with refusals by opposing counsel. Requests for production of certain privileged documents or for an undertaking to disclose evidence obtained after discovery are often met with: "we will comply with the *Rules*". Counsel who know the *Rules of Civil Procedure*[1] *(*the "*Rules")* and how those rules have been interpreted by the courts can take appropriate steps in the face of such responses. It is with this in mind that we address some of the common refusals that plaintiff's counsel face, examine their legitimacy, and offer practical solutions on how to best to address and respond to them.

We begin this paper by explaining the *Rules* governing disclosure and production, with a particular focus on privileged documents. We then examine three common refusals that defence counsel often raise: first, the refusal to provide the information contained in a privileged document; second, the refusal to provide information contained in a privileged statement that the defendant has provided to his or her insurer; and third, the scope and parameters of disclosing and producing surveillance evidence.

## I. THE *RULES OF CIVIL PROCEDURE* GOVERNING DISCOVERY

Before examining the typical refusals raised by defence counsel and addressing their legitimacy, it is important to briefly review the *Rules* applicable to examinations for discovery and production of documents. In particular, we will examine the scope of the obligation to serve an affidavit of documents, litigation privilege, and the disclosure requirements for privileged documents. A thorough understanding of the *Rules*—what they say, how they fit together, and how they have been interpreted by judges—will allow counsel to prepare for and address illegitimate refusals by defence counsel.

[1] The Rules of Civil Procedure. O. Reg. 575/07, s. 6 (1).

## 1. Disclosure and Production under the *Rules*

The *Rules of Civil Procedure* are designed to provide the parties with full disclosure of information in order to "prevent surprise and trial by ambush".[2] According to Carthy J.A.:

> [T]he discovery rules must be read in a manner to discourage tactics and encourage full and timely disclosure. Tactical manoeuvres lead to confrontation. Disclosure leads sensible people to assess their position in the litigation and to accommodate.[3]

Rule 30.02 lays out a party's documentary disclosure and production obligations. Under Rule 30.02(1), every document relevant to any matter in issue that is or has been in a party's possession, control or power must be disclosed, whether or not privilege is claimed. Rule 30.02(2) requires each party, upon request from another party, to produce for inspection every relevant document that is in their possession, control, or power, that is not privileged.[4]

Rule 30.08(1) prescribes the consequences for failing to comply with disclosure and production obligations. Under this Rule, if a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with the *Rules*, the party may not use that document at trial if the document is favourable to the party's case, except with leave of the trial judge. If the document is not favourable to the party's case, the court may make an order as it sees fit.[5]

## 2. Obligation to Serve an Affidavit of Documents

To give effect to the disclosure and production requirements outlined above, Rule 30.03 obligates each party to swear and serve an affidavit of documents. The affidavit shall list and describe, in separate schedules, all relevant documents:

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[2] John W. Morden & Paul M. Perell, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis, 2014), at paras. 7.9

[3] *Ceci (Litigation guardian of) v. Bonk,* 1992 CarswellOnt 432, [1992] O.J. No. 380, 31 A.C.W.S. (3d) 1161, 3 W.D.C.P. (2d) 164, 56 O.A.C. 346, 6 C.P.C. (3d) 304, 7 O.R. (3d) 381, 89 D.L.R. (4th) 444 at para 9

[4] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.02

[5] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.08

> [Schedule A] that are in the party's possession, control or power that the party does not object to producing;
>
> [Schedule B] that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for that claim; and
>
> [Schedule C] that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed over them, together with a statement of when and how the party lost possession or control or power over them and their present location.[6]

Rule 30.08(2) prescribes the consequences for failing to serve an affidavit of documents. Under this Rule, the court may revoke or suspend the party's right to initiate or continue an examination for discovery, dismiss the action if the party is a plaintiff, strike out the statement of defence if the party is a defendant, or make any other order that is just.[7]

It is important to note that while Rule 31.03(1) provides that a party "may" conduct an examination for discovery, Rule 30.03(1) states that a party "shall" serve an affidavit of documents. The obligation to provide an affidavit of documents, which includes listing privileged documents in Schedule B, is therefore mandatory.[8]

In addition, Rule 48.04(2) specifically provides that a party is not relieved from its obligation under Rule 30.07 to disclose documents discovered after the examination for discovery or that were not previously disclosed in an affidavit of documents, even after a matter is set down for trial,.[9] As such, documentary disclosure and the obligation to serve supplementary affidavit of documents are obligations that extend beyond the examination for discovery and continue right up until trial.

### 3. Litigation Privilege

[6] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.03
[7] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.08
[8] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 52
[9] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 52

In *The Law of Privilege in Canada,* Hubbard, Magotiaux and Duncan describe litigation privilege as follows:

> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing.[10]

In order to attach litigation privilege to a document, the document must have been generated for the purpose of the specific litigation at hand.[11] Chappel J. summarized the purpose of litigation privilege as follows:

> The purpose of litigation privilege is to provide counsel with a reasonable "zone of privacy" within which they can carry out investigations and research and formulate strategies for the case without running the risk of having to prematurely reveal their opinions, strategies and conclusions to opposing counsel.[12]

However, as this paper demonstrates, there is an inherent tension between the objectives of litigation privilege on the one hand, and disclosure of relevant information to promote truth finding and achieving expeditious resolutions on the other hand. The courts in Ontario are of the view that where these competing values are irreconcilable, the balance should tip in favour of fulsome discovery.[13] According to Carthy J.A.:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.[14]

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[10] Robert W. Hubbard, Susan Magotiaux and Suzanne Duncan, *The Law of Privilege in Canada, Volume 2*, para. 12.10 (Toronto: Canada Law Book, 2013)

[11] *Blank v. Canada (Department of Justice)*, [2006] S.C.J. No. 39 (S.C.C.).

[12] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284 at para 45

[13] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284 at para 46

[14] *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898, [1999] O.J. No. 3291, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321, 92 A.C.W.S. (3d) 26 at para 25

### 4. Disclosure Obligations for Privileged Documents

Rule 30.09 addresses the disclosure and production of privileged documents. This Rule reads:

> **30.09 Privileged Document Not to Be Used Without Leave**
>
> Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.[15]

Accordingly, Rule 30.09 affords the parties an exception to use a privileged document that was not produced 90 days before trial, but only for impeachment purposes. In *Ceci (Litigation guardian of) v. Bonk*, the Ontario Court of Appeal held that this exception under Rule 30.09 is consistent with the principle of full exchange of information at all stages of litigation. According to Carthy J.A., the obligation to include any privileged document in the affidavit of documents, the ability of the opposite party to demand particulars of its contents on discovery, and the limited use of the privileged document for impeachment purposes only, combine to dispel any suggestion that Rule 30.09 encourages trial by ambush.[16]

## II. COMMON REFUSALS RAISED BY DEFENCE COUNSEL

In this section, we address three common refusals that defence counsel often raise:

1. Refusal to provide information contained in a privileged document;
2. Refusal to provide information regarding a privileged statement that the defendant provided to his or her insurer; and
3. Refusal to disclose or where applicable produce surveillance documents

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[15] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.09

[16] *Ceci (Litigation guardian of) v. Bonk*, 1992 CarswellOnt 432, [1992] O.J. No. 380, 31 A.C.W.S. (3d) 1161, 3 W.D.C.P. (2d) 164, 56 O.A.C. 346, 6 C.P.C. (3d) 304, 7 O.R. (3d) 381, 89 D.L.R. (4th) 444 at para 8

1. **Informational vs. Documentary disclosure**

Plaintiff counsel will often ask for a summary of the information contained in a privileged document listed in Schedule B. Often times, defence counsel will refuse to provide any such information on the grounds that litigation privilege protects not just the document, but also the information contained in it. As such, it is important to examine the distinction between discovery of documents under Rule 30, and discovery of information, under Rule 31.

In Canada, there seem to be conflicting authorities on this issue. The jurisprudence from Alberta's Court of Queen's Bench and the Manitoba Court of Appeal seem to favour extending litigation privilege beyond the privileged document itself, to include facts that a party being discovered has obtained from the privileged document.[17] In Ontario, however, the jurisprudence suggests that the scope of oral discovery is wider under Rule 31.06. This was best illustrated by Professor Sharpe (now Sharpe J.A.):

> It is well established in the case law that where a party on discovery has asked for facts relating either to his own case or to that of his opponent, those facts must be revealed, notwithstanding that the party's source of information is a privileged report or document.[18]

The following passage from the reasoning of Borins D.C.J. (as he then was) in *Sacrey v. Berdan* helps clarify this point:

> It is also important to distinguish between discovery of documents, provided by R. 30, and discovery of information, provided by R. 31. It was submitted by the defendant that the plaintiff was not entitled to discovery of the information which it seeks on the ground that it is privileged. This, in my view, is incorrect and results from an attempt to apply the provisions of subr. 30.03(2)(b) and, perhaps, r. 30.09, to r. 31.06. As indicated earlier, in her affidavit of documents the defendant objects to the production of the report of Equifax Services Ltd. on the ground that it is privileged as it was prepared in

[17] See for example *Blair v. Wawanesa Mutual Insurance Co.*, 2000 ABQB 447, 2000 CarswellAlta 660, [2000] 9 W.W.R. 505, [2000] A.W.L.D. 534; *Lytton v. Alberta*, 1999 ABQB 300, 1999 CarswellAlta 1333, [1999] A.J. No. 457, 245 A.R. 290; *Sovereign General Insurance Co. v. Tanar Industries Ltd.*, 2002 ABQB 101, 2002 CarswellAlta 83, [2002] 3 W.W.R. 340, [2002] A.W.L.D. 103; and *Chmara v. Nguyen*, 1993 CarswellMan 115, [1993] 6 W.W.R. 286, [1993] M.J. No. 274, 104 D.L.R. (4th) 244, 16 C.P.C. (3d) 177,

[18] Robert J. Sharpe, *Claiming Privilege in the Discovery Process* (Special Lectures of the Law Society of Upper Canada, 1984), at page 169

> contemplation of litigation. However, the plaintiff does not seek discovery of the report. Subrules 31.06(1) to (3) enable a party to obtain on examination for discovery much of the information contained in a document which is protected from production or discovery on the ground of privilege. Pursuant to these subrules the examining party is entitled to be told of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue, the substance of their expected evidence, and, unless an undertaking is given not to call an expert as a witness at trial, the names and addresses of experts, engaged by or on behalf of the party examined, together with the findings, opinions and conclusions of the expert. But witness statements and, subject to r. 53.03, experts reports remain privileged from production as constituting part of the lawyer's work product and being a document prepared in contemplation of litigation, respectively.[19]

In *Llewellyn v. Carter*, the Prince Edward Island Court of Appeal followed Ontario's line of reasoning. Writing for the Court, McQuaid J.A summarized Ontario's approach as follows:

> The Ontario courts give a plain meaning to rule 31.06 and a meaning that can be reconciled with rule 30 which permits a claim for privilege over a document itself. Rule 31.06 means that information relevant to matters in issue must be disclosed in oral discovery, and to this extent the right of litigation privilege has been abrogated. Documents remain protected from disclosure but the evidence in a particular document which is relevant to the proof of the facts in the matter must be disclosed in accordance with Rule 31.06.[20]
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> In summary, for the reasons I have set forth above and based on a consideration of the above authorities, I accept the plain meaning interpretation given by the Ontario courts to the rules on documentary disclosure and discovery examination. I specifically reject the approach taken by the Manitoba Court of Appeal in *Chmara v. Nguyen*, supra and by the motions judge in *Breau v. Naddy* {[1995] P.E.I.J. No, 108 (P.E.I.S.C.)}. Like the motions judge in this case, these two authorities failed to recognise the distinction made by the *Rules of Court* between documentary disclosure in Rule 30 and the broader informational disclosure required by the plain terms of Rule 31. On the other hand, the reasoning of the Ontario courts, interpreting precisely the same rules applicable in this court,

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[19] *Sacrey v. Berdan*, 1986 CarswellOnt 353, [1986] O.J. No. 2575, 10 C.P.C. (2d) 15, 38 A.C.W.S. (2d) 296

[20] *Llewellyn v. Carter*, 2008 PESCAD 12, 2008 PECA 12, 2008 CarswellPEI 38, [2008] P.E.I.J. No. 38, 176 A.C.W.S. (3d) 368, at para 44

> recognizes the distinction between the two forms of disclosure, the result being a fairer and more reliable civil litigation process.[21]

In *Pearson v. Inco Ltd.,* one of the issues before the court was whether Rule 36.01 requires a party to disclose facts relating to issue in the action when privileged documents are the source of that information.[22] After acknowledging the conflict that exists in Canadian jurisprudence, Cullity J. upheld Ontario's line of jurisprudence and held that although the document at issue was privileged, the opposing party was entitled to disclosure of relevant facts contained in them.[23]

In sum, while a party can claim privilege over a document where its "dominant purpose" is for the litigation at hand, the information contained in the document may not be privileged. There is, however, at least one exception to this rule, which we now turn to.

**2. Information in a Privileged Statement that the Defendant Provided to the Insurer**

Often at an examination for discovery, defence counsel refuses to provide information contained in a Schedule B statement that the defendant provided to his or her insurer. As a rule of thumb, when there is no distinction between the privileged statement and the contents in it, and where the plaintiff has an alternative way to obtain that information, for example by discovering the defendant, or if the questions sought go directly to the defendant's credibility, then the defendant need not answer questions about the information that is contained in a statement that he or she provided to his or her insurer.

This issue was addressed by the Divisional Court in *Sangaralingam v. Sinnathurai.*[24] At the examination for discovery, plaintiff's counsel had asked the defendant to either produce the statement that he gave to his insurer, or to provide the information contained in the statement. Defence counsel refused to produce both the document and the information

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[21] *Llewellyn v. Carter*, 2008 PESCAD 12, 2008 PECA 12, 2008 CarswellPEI 38, [2008] P.E.I.J. No. 38, 176 A.C.W.S. (3d) 368, at para 57

[22] *Pearson v. Inco Ltd.*, 2008 CarswellOnt 5408, [2008] O.J. No. 3589, 169 A.C.W.S. (3d) 524 at para 13

[23] *Pearson v. Inco Ltd.*, 2008 CarswellOnt 5408, [2008] O.J. No. 3589, 169 A.C.W.S. (3d) 524 at para 21

[24] *Sangaralingam v. Sinnathurai*, 2011 ONSC 1618, 2011 CarswellOnt 1818, 105 O.R. (3d) 714, 14 C.P.C. (7th) 378, 199 A.C.W.S. (3d) 392, 280 O.A.C. 146, 94 C.C.L.I. (4th) 14, 9 M.V.R. (6th) 311

contained in it on the basis that the statement and its information were protected by litigation privilege.[25]

At issue before the Divisional Court was whether privilege extends to the contents of the statement. Writing for the Court, Herman J. acknowledged that while a party under examination cannot withhold relevant information simply because that information may be contained in a privileged document, when the information at issue is the statement that the defendant provided to his or her insurer about the events relating to the accident, the plaintiff has the opportunity to ask those questions at the examination for discovery. Therefore, there is an alternative means available for the plaintiff to obtain the relevant information without requiring the defendant to disclose the contents of the privileged statements.[26]

According to Herman J., when there is no distinction between the privileged statement and the contents of the statement (as is the case in a defendant's statement to his insurer), and the plaintiff has an alternative way to obtain that information from the defendant, the defendant need not provide the content of the statement. Also, questions that go directly to the defendant's credibility need not be answered.[27]

### 3. Disclosure and Production of Surveillance

Requesting production or disclosure of surveillance, or an undertaking to disclose subsequently obtained surveillance, will usually result in a "we will comply with the *Rules*" response from defence counsel. As such, it is important for junior plaintiff counsel to know the scope and parameters of the *Rules* with respect to surveillance so that they can strategize their examination for discovery accordingly.

As previously mentioned, privileged documents must be included in a party's affidavit of documents. Surveillance video is a document pursuant to Rule 30.01(1). Under Rule

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[25] *Sangaralingam v. Sinnathurai*, 2011 ONSC 1618, 2011 CarswellOnt 1818, 105 O.R. (3d) 714, 14 C.P.C. (7th) 378, 199 A.C.W.S. (3d) 392, 280 O.A.C. 146, 94 C.C.L.I. (4th) 14, 9 M.V.R. (6th) 311 at para 8

[26] Sangaralingam v. Sinnathurai, 2011 ONSC 1618, 2011 CarswellOnt 1818, 105 O.R. (3d) 714, 14 C.P.C. (7th) 378, 199 A.C.W.S. (3d) 392, 280 O.A.C. 146, 94 C.C.L.I. (4th) 14, 9 M.V.R. (6th) 311 at para 26

[27] *Sangaralingam v. Sinnathurai*, 2011 ONSC 1618, 2011 CarswellOnt 1818, 105 O.R. (3d) 714, 14 C.P.C. (7th) 378, 199 A.C.W.S. (3d) 392, 280 O.A.C. 146, 94 C.C.L.I. (4th) 14, 9 M.V.R. (6th) 311 at para 36

30.03(2)(b), video or photo surveillance is typically included in Schedule B to the affidavit of documents as a privileged report from an investigator. The plaintiff can thus request full particulars of the surveillance from the defendant at the examination for discovery. The particulars which must be disclosed upon request include date, time and location of surveillance, the nature and duration of the activities depicted, and the names and addresses of the photographers or videographers.[28]

Accordingly, while a surveillance video or photo itself remains privileged, the facts disclosed by it do not.[29] A person examined for discovery must answer questions about the contents of the surveillance, even if doing so would require the disclosure of information contained in a privileged document.[30] The importance of disclosing surveillance in a personal injury action was described by Lauwers J.A.:

> Pre-trial disclosure of surveillance in a personal injury action is particularly important since the impact of video evidence can be powerful. Disclosure also provides the parties with the opportunity to carry out a realistic assessment of their positions and therefore facilitates settlement.[31]

According to Hambly J.:

> The surveillance evidence will assist the plaintiff in evaluating the strength of her case and arriving at her settlement position prior to trial. Even if the defendant will not be able to use the surveillance evidence for impeachment purposes, as a result of its non-disclosure, the defence will gain knowledge of the plaintiff from the surveillance evidence which it will be able to use to its benefit.[32]

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[28] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 40

[29] *Ibid* at para 41; see also *Machado v. Berlet,* 1986 CarswellOnt 498, [1986] O.J. No. 1195, 15 C.P.C. (2d) 207, 2 A.C.W.S. (3d) 167, 32 D.L.R. (4th) 634, 57 O.R. (2d) 207 at para 6

[30] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 41; see also *Murray v. Blackwood*, 1988 CarswellOnt 484, [1988] O.J. No. 1767, 12 A.C.W.S. (3d) 247, 30 C.P.C. (2d) 268, 31 O.A.C. 153, 66 O.R. (2d) 129 at para 13

[31] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 44

[32] *Arsenault-Armstrong v. Burke*, 2013 ONSC 4353, 2013 CarswellOnt 8681, 116 O.R. (3d) 508, 229 A.C.W.S. (3d) 365, 53 C.P.C. (7th) 431 at para 11

As Lauwers J.A. observed in *Iannarella v. Corbett* (2015 ONCA 110), surveillance evidence can only encourage settlement if it is disclosed in the affidavit of documents and the opposing party has the opportunity to seek particulars at examination for discovery.[33]

Surveillance evidence can either be used as substantive evidence to address the plaintiff's functional abilities, or to impeach the plaintiff's credibility. In *Landolfi v. Fargione,* [2006] O.J. No. 1226, the Court of Appeal explained the distinction between the use of evidence to impeach a witness's credibility versus using evidence as substantive proof for the purposes of Rule 30.09. Where a party wishes to use a document as substantive evidence, s/he must waive the privilege and disclose the document to the opposing party. Where a party wishes to maintain privilege over the document, s/he can only use it for impeachment purposes.[34]

Thus, where a defendant intends to use surveillance as substantive evidence at trial, it must comply with Rule 30.09 and disclose the surveillance at least 90 days before trial, or otherwise obtain leave from the court pursuant to Rule 53.08. However, if the surveillance materials are the subject of a valid litigation privilege that has not been waived, the defendant claiming privilege is not required to produce the actual surveillance report or related recordings.[35]

Where a defendant intends to use surveillance for impeachment purposes, the defendant need not produce the surveillance, but it must disclose the surveillance in Schedule "B" of its Affidavit of Documents. Accordingly, if surveillance is taken before the affidavit of documents is served, the surveillance report must be listed in the affidavit and requests for particulars must be answered at examination for discovery.[36] As such, listing the surveillance report in the affidavit of documents and disclosing its particulars, if requested, is a condition precedent to the use of the surveillance material at trial.[37]

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[33] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 45

[34] *Landolfi v. Fargione*, 2006 CarswellOnt 1855, [2006] O.J. No. 1226, 147 A.C.W.S. (3d) 400, 209 O.A.C. 89, 25 C.P.C. (6th) 9, 265 D.L.R. (4th) 426, 79 O.R. (3d) 767 at paras 73-74

[35] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284 at para 57

[36] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 54

[37] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 54

Under Rule 30.07, the defence must also disclose the existence of surveillance even if obtained after the examination for discovery. Rules 30.06 and 30.07(b) combine to obligate each party to provide an updated affidavit of documents and list the new surveillance. Rule 31.09(1)(b) further obligates the parties to disclose the particulars of subsequent surveillance upon request by the plaintiff. These disclosure obligations extend to the surveillance obtained after the original affidavit of documents was served.[38]

Again, pursuant to Rule 30.08(1)(a), if an undisclosed document is favourable to the party's case, "the party may not use the document at trial, except with leave of the trial judge."[39] According to Lauwers J.A:

> Rule 31.09(3) applies the same penalty for failure to update an inaccurate or incomplete answer given on discovery. These rules apply even if the undisclosed evidence will be used solely for impeachment.[40]

**4. Implied Waiver of privilege over Surveillance**

As plaintiff counsel learns more about the surveillance evidence in the defendant's possession, s/he should explore whether there is a basis to defeat the defendant's claim of privilege over the surveillance. Litigation privilege may be waived intentionally or inferentially, or as a matter of fairness. As McLachlin J. (as she then was) stated in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*,[41] which has also been followed in Ontario:[42]

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of

[38] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 55
[39] Rules of Civil Procedure — Ont. Reg. 194, R.R.O. 1990, Reg. 194, s. 30.08
[40] *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 249 A.C.W.S. (3d) 922, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185 at para 78

[41] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CarswellBC 147, [1983] 4 W.W.R. 762, [1983] B.C.W.L.D. 1309,

[42] See for example *Browne (Litigation Guardian of) v. Lavery,* 2002 CarswellOnt 496, [2002] O.J. No. 564; and *Aherne v. Chang*, 2011 ONSC 3846

> the privilege, and (2) voluntarily evinces an intention to waive the privilege. However, waiver may also occur in the absence of the intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be a waiver as to the entire communication.[43]

Therefore, plaintiff counsel should always explore whether there is a basis for an implied waiver of privilege over the surveillance documents.

In the following section, we address two ways in which defence counsel may have impliedly waived litigation privilege over surveillance documents. However, these two scenarios are not exhaustive and plaintiff counsel must always be on the lookout for other situations where an implied waiver of privilege may have resulted.

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### A. Waiving Litigation Privilege over one Surveillance Document Results in an Implied Waiver of Privilege over all Surveillance Documents

A number of courts across the country have specifically ruled that waiver of privilege over one surveillance document will result in an implied waiver of privilege over all other surveillance materials. In Ontario, Chappel J. addressed this issue in *Cromb v. Bouwmeester.*[44] Here, the defendant had waived litigation privilege over two surveillance DVDs of the plaintiff as well as the accompanying reports. The defendant subsequently refused to disclose the third DVD and its related report from the same investigator. Chappel J. held that this practice raises questions as to whether the evidence in the third surveillance is detrimental to the defendant, and that they are cherry-picking favourable evidence.[45] Accordingly, she was satisfied that upholding the defendant's claim of litigation privilege over the third DVD and the related report would create a significant risk of the court not receiving a full and accurate picture of the plaintiff's true level of functioning.[46] Although the defendant had raised concerns that the third round of surveillance was undertaken after the

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[43] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CarswellBC 147, [1983] 4 W.W.R. 762, [1983] B.C.W.L.D. 1309 at para 6

[44] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284

[45] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284 at para 53

[46] *Cromb v. Bouwmeester*, 2014 ONSC 5318, 2014 CarswellOnt 12677, [2014] O.J. No. 4298, 244 A.C.W.S. (3d) 284 at para 53

plaintiff had learned about the defendant's arrangement for surveillance, Chappel J. reasoned that any such concern can go to the weight of the evidence.

Similarly, in *O'Scolai v. Antrajenda* before the Alberta Court of Queen's Bench, the plaintiff sought disclosure of the entire files of any investigator who had undertaken surveillance after the defendant waived litigation privilege over one surveillance videotape. Read J. concluded that there had been an implied waiver of privilege with respect to all reports, photographs and recordings made in relation to surveillance activities undertaken by the particular investigator who had created the videotape that had been produced. Read J. went on to emphasize that selective disclosure of an investigator's surveillance activities amounts to "cherry picking" favourable evidence and would mislead the court about the plaintiff's functioning.[47] Similarly, in *Green v. Clarke*, the Nova Scotia Supreme Court concluded that waiver of litigation privilege over some surveillance videos results in an implied waiver of privilege over all surveillance videos and their accompanying reports.[48]

### B. Providing Surveillance to Medical Expert Results in Waiver of Privilege

In *Aherne v. Chang,* Perrell J. held that surveillance privilege is waived when defence counsel elects to produce the surveillance to its medical expert.[49] If surveillance is voluntarily disclosed to a health practitioner retained for a defence medical, then it should be simultaneously disclosed to the plaintiff.[50]

*Aherne v. Chang*[51] was a medical malpractice case. During the defendant doctor's examination for discovery, he stated that no surveillance had been conducted of the plaintiff. The plaintiff's counsel then asked for an undertaking to produce a copy of any surveillance records concurrent with the release of the records to any health practitioner retained to perform a defence medical assessment of the plaintiff. The undertaking was refused, leading the plaintiff to move for an order compelling an answer to the undertaking. Master

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[47] *O'Scolai v. Antrajenda*, 2008 ABQB 77, 2008 CarswellAlta 317, [2008] A.W.L.D. 1548, [2008] A.J. No. 241, 169 A.C.W.S. (3d) 744, 447 A.R. 357, 53 C.P.C. (6th) 342, 89 Alta. L.R. (4th) 346

[48] *Green v. Clarke*, 1995 CarswellNS 58, [1995] N.S.J. No. 216, 143 N.S.R. (2d) 74, 38 C.P.C. (3d) 40, 411 A.P.R. 74, 55 A.C.W.S. (3d) 263

[49] *Aherne v. Chang*, 2011 ONSC 3846, 2011 CarswellOnt 5402, [2011] O.J. No. 2797, 16 C.P.C. (7th) 143, 203 A.C.W.S. (3d) 772, 337 D.L.R. (4th) 593

[50] Paras 17-19

[51] *Aherne v. Chang*, 2011 ONSC 3846, 2011 CarswellOnt 5402, [2011] O.J. No. 2797, 16 C.P.C. (7th) 143, 203 A.C.W.S. (3d) 772, 337 D.L.R. (4th) 593

Short concluded that if a defendant sends privileged surveillance reports to a defence medical expert, the defendant waives privilege over the surveillance reports. Accordingly, Master Short granted the plaintiff's motion.[52]

The defendant appealed. On appeal, Perrell J. upheld Master Short's judgment, holding that when a defendant discloses surveillance evidence to its expert doctors, it waives the privilege attached to that surveillance and must therefore disclose it to the plaintiff. According to Perrell J.:

> With some oversimplification, my opinion, which I will develop in detail below, is that the rules about the production of defence medicals and the law about waiver of privilege entail or have the consequence that if the defendant discloses surveillance evidence to a health practitioner - which the defendant is not obliged to do - then the defendant has waived the litigation privilege associated with the surveillance evidence.
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> Put somewhat differently, the defendant's voluntary disclosure of surveillance evidence to a health practitioner for the purposes of a defence medical has the consequence that the surveillance evidence should be immediately disclosed to the plaintiff. [53]

As mentioned above, in an examination for discovery, the party gathering surveillance must disclose the particulars of that surveillance upon request, including the date, time and location of surveillance, summary of the observations made, and the names and addresses of the persons who conducted the surveillance.[54] However, Rule 31.06(3) goes even further and requires that if the surveillance material is provided to an expert witness who will be a witness at trial, then the opposing party may, on an examination for discovery, obtain disclosure of the findings, opinions and conclusions of the expert that are relevant to a matter in issue. Disclosure of expert witnesses' "findings" under Rule 31.06 has been given a wide meaning. "Findings" include all documents, videotapes, photographs and any information which were forwarded to the expert, including surveillance information.[55]

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[52] *Aherne v. Chang*, 2011 ONSC 2067, 2011 CarswellOnt 2730, [2011] O.J. No. 1880, 106 O.R. (3d) 297, 201 A.C.W.S. (3d) 61

[53] *Aherne v. Chang*, 2011 ONSC 3846, 2011 CarswellOnt 5402, [2011] O.J. No. 2797, 16 C.P.C. (7th) 143, 203 A.C.W.S. (3d) 772, 337 D.L.R. (4th) 593 at paras 12-13

[54] *Iannarella v. Corbett*, 2015 ONCA 110; *Ceci (Litigation guardian of) v. Bonk*, 1992 CarswellOnt 432, [1992] O.J. No. 380, 31 A.C.W.S. (3d) 1161; *Aherne v. Chang*, 2011 ONSC 3846

[55] *Aherne v. Chang*, 2011 ONSC 3846 at para 21; *Beausoleil v. Canadian General Insurance Co.*, 1993 CarswellOnt 4307, [1993] O.J. No. 2200, [1993] O.J. No. 220;

In addition, Perrell J. was of the view that producing the surveillance documents to the plaintiff when the defendant had voluntarily provided them to its medical expert is a matter of fairness and consistency.[56] Following McLachlin J.'s (as she then was) ruling on implied waiver as a matter of fairness in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.,* Perrell J. held:

> […] under rule 33.04 (2), which is set out below, the plaintiff is compelled to provide his or her medical records and medical report to the health practitioner, and under s. 105 (5) of the *Courts of Justice Act*, which is also set out below, the plaintiff shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. Having disclosed his or her information and being compelled to make further disclosure, it is a matter of rudimentary fairness that the plaintiff know what information the defendant has provided to the health practitioner. The disclosure of the information is also consistent with the policy of the modern rules of civil procedure to reduce ambush and surprise as tactical weapons in the adversary system of adjudication.[57]

As such, Perrell J. concluded that at common law, there is a waiver of litigation privilege if the defendant provides the health practitioner with the surveillance evidence.[58]

It is important to note that under Rule 33.06(2), unlike other expert reports, an in-person defence medical health practitioner's expert report must be disclosed to all parties. The defendant cannot undertake to not call the expert as a witness at trial in order to keep the report confidential. The report must be served on all parties. Accordingly, no privilege is attached to the report. Therefore, if no privilege is attached to the report, then no privilege is attached to the information that has been provided to the health practitioner to prepare the report.[59]

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[56] *Aherne v. Chang*, 2011 ONSC 3846 at para 26
[57] *Aherne v. Chang*, 2011 ONSC 3846 at para 27
[58] *Aherne v. Chang*, 2011 ONSC 3846 at para 30
[59] *Aherne v. Chang*, 2011 ONSC 3846 at para 34

As well, the material provided to a health practitioner, including surveillance evidence, must be disclosed as part of the information provided under Rule 53.03, which requires the filing of a report from any expert who a party intends to call as a witness at trial.[60]

It is important to note that the waiver of litigation privilege takes place when the defendant voluntarily sends the surveillance material to the health practitioner knowing that it will be disclosed to the plaintiff.[61] Perrell J. concluded:

> I, therefore, conclude that the litigation privilege associated with the surveillance material is waived when the defendant includes the surveillance material in his or her instructions to the health practitioner. I see productivity and no unfairness in this conclusion. If the defendant does not wish to waive what is left of the litigation privilege associated with surveillance evidence, then he or she should not send the surveillance material to the health practitioner. [62]

**CONCLUSION**

The key to a successful discovery is an in-depth knowledge of the facts and the law. Where faced with a more senior opposing counsel, knowledge of the *Rules of Civil Procedure* and the law are the only tools at a junior counsel's disposal that may level the playing field. As the latter part of this paper shows, keeping up with the development of the case law will allow counsel to explore situations where defence counsel may have unintentionally, but impliedly, waived litigation privilege over a privileged document. Being aware of such circumstances will allow plaintiff counsel to take advantage of various scenarios that may arise in the course of litigation. It is only with thorough knowledge of the law and the *Rules* that you will be able to get the best result possible for your client.

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[60] *Aherne v. Chang*, 2011 ONSC 3846 at para 35
[61] *Aherne v. Chang*, 2011 ONSC 3846 at para 43
[62] *Aherne v. Chang*, 2011 ONSC 3846 at para 45