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US Companies Can Protect THEIR CONFIDENTIAL INFORMATION IN CROSS BORDER LITIGATION



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the confidential information obtained during the Canadian discovery process for improper purposes. We then describe various strategic tools to protect confidential information which can be economically implemented at early stages of litigation.

A. Introduction

Confidential information and trade secrets have significant commercial value which must be protected from disclosure to the public domain. American companies should be aware that these assets can be threatened when Canadian subsidiaries or affiliates face demands for production of this information as part of extensive pre-trial discovery obligations.

Understanding how to limit or control the disclosure of such information is essential to American companies: for example, a 3PL provider in Minneapolis can face demands by its Canadian subsidiary to produce confidential information such as lists of US customers and their needs, in response to Canadian discovery requirements. The response by the 3PL provider ideally will protect its confidential information, but enable its subsidiary to meet its obligations within the Canadian litigation.

This paper sets out various responses for American companies to protect confidential information in Canada. We first review what constitutes confidential information and trade secrets in Canada, generally, and then outline the common law and statutory protections which are intended to prohibit parties from using

B. Identifying Confidential Information and Trade Secrets

i) What is Confidential Information?

To avoid the risk of inadvertent disclosure, and to limit challenges whether information is properly designated to be “confidential,” all confidential information should be defined and designated as such by a corporation in its corporate documents. This is the preferred approach to ensure there is no doubt whether information is designated as being confidential by a corporation.

However, where a corporation has failed to define or designate its confidential information, one can seek to rely upon common law definitions. Generally, Canadian law establishes a low threshold for information to be designated as “confidential.”² Information is “confidential” if it is “some product of the human brain” which is not available to the public.³ As Justice Sopinka of the Supreme Court of Canada explained:

The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and

public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.⁴

Of course, once the information becomes public knowledge, it no longer qualifies as confidential.⁵

Information which combines public and private information may qualify as confidential to a limited extent.⁶ Similarly, confidential information can be comprised of simple or publically available information. Simplicity is not a bar to confidentiality and may in fact increase the need for protection.⁷

Some examples of confidential information in administrative documents include:

1. Lists of suppliers;
2. Lists of customers and their needs;
3. Instructions regarding manufacturing processes;

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4. Lists of employees and relevant employment information; and
5. Computer programs cataloging the firm's business.⁸

ii) What is a Trade Secret?

In Canada, trade secrets are distinct but related to confidential information; though in some cases the two are treated as being synonymous.⁹ Generally, trade secrets represent more specialized or technical information for which a higher level of secrecy is required.¹⁰ To qualify as a trade secret, the information must be specific, ascertainable, and not of a general nature.¹¹ The owner of the information must demonstrate an intention to keep its contents secret and to treat it as being confidential.¹²

The Ontario Superior Court set out the following factors to consider when identifying a trade secret:

1. the extent to which the information is known outside the business;
2. the extent to which it is known by employees and others involved in the business;
3. measures taken to guard the secrecy of the information;
4. the value of the information to the holder of the secret and to its competitors;
5. the effort or money expended in developing the information;
6. the ease or difficulty with which the information can be properly acquired or duplicated by others; and
7. whether the holder and taker of the secret treat the information as secret.¹³

Further, Canadian Courts have generally defined trade secrets as:

1. a property right;
2. a plan or process, tool, mechanism, or compound known only to its owner;
3. a secret formula or process not patented but having some commercial value; and
4. any formula, pattern, device or compilation of information used

in one's business which provides an advantage over competitors.¹⁴

C. The Discovery Process in Canada

The obligation to produce all documents relevant to issues pleaded in an action poses a constant threat of disclosure to confidential information and trade secrets.

The discovery process in Canada is a form of "compelled disclosure" which requires parties in litigation to disclose relevant documents and answer questions in examination.¹⁵ Parties are required by statute to participate in discovery and provide all relevant information which is not protected by privilege – even if it results in self-incrimination.¹⁶

The purpose of this process is to avoid "litigation by ambush," increase the chances of settlement, and reduce the number of issues to be resolved at trial.¹⁷

In Ontario, discovery and production obligations are codified in the *Rules of Civil Procedure*.¹⁸ Rule 30.02(1) sets out the basic obligation. Parties are compelled to disclose every document relevant to a matter in issue which is or has been in "the possession, control or power" of that party.¹⁹ Those documents must also be produced for inspection.²⁰

The scope of discovery includes relevant documents in the possession, control or power of a "subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party."²¹ This requirement can be the basis for a request to extend the production obligation across the border to US corporations, even though the Ontario corporation is the subsidiary or the affiliate, and the US parent corporation is *not* a party.

Further, discovery obligations can be extended to non-parties who possess relevant documents, though they are not involved in the action. Under Rule 30.10(1), the Court may order production from a non-party where it is

satisfied that the document is relevant to a material issue in the action and it would be unfair to require the moving party to proceed to trial without it.²²

For example, in *Scienton Technologies Inc v. Canadian Imperial Bank of Commerce*, the Ontario plaintiffs brought an action in the United States against a Delaware-based defendant, alleging breach of contract, trade secret misappropriation, unfair competition, interference with contractual relations, misappropriation of an idea, and breach of fiduciary duty. The plaintiffs then brought an application in Ontario asking the Ontario Court to give effect to a request for Judicial Assistance issued in proceedings in the United States District Court for Eastern District of New York.²³

The Ontario plaintiffs successfully obtained an order to require the respondent non-parties to the American action to produce documents and to attend for examinations in Toronto, Ontario.²⁴ As a result of this order, non-party corporations were ordered to incur the expense and inconvenience of discovery, and required to produce their confidential information

Generally, Canadian Courts will order production of documents that have any semblance of relevance regardless of whether they are confidential information and the consequences for failure to produce relevant documents can be severe. Therefore, a party that objects to answering demands for production should obtain a Court order to limit its obligation to answer requests for production of documents rather than risk being sanctioned by a Court that concludes that production should have been made.

The following case is an example where a US company succeeded in limiting its discovery obligation.

In *Farris v. Staubach Ontario Inc et al*, a Defendant in Texas faced demands for production of confidential information arising during the discovery process in Canada. Here the Texas company stored American

and Canadian documents on its server located in Texas. The Canadian plaintiff brought a motion in Ontario, Canada seeking further discovery and production from the defendant, and sought further searches of TSC's server and electronic backup from its Dallas office. TSC submitted that it had already performed an electronic search of the "Canadian section" of its Dallas server.

In this case, the American defendant succeeded in avoiding an order for further production, mainly because it was able to persuade the Court it had already searched the server adequately for relevant productions, and had satisfied the Canadian discovery obligations. Consequently, the Court refused the plaintiff's request on the grounds that the document search requested was overly broad, economically expensive, and had the potential to locate thousands of irrelevant documents.²⁵

D. Implied and Deemed Undertakings

i) Implied Undertaking Rule

There is some protection accorded to confidential information in the Canadian judicial system, at common law and by statute, although the protection is limited and easily avoided if one seeks to use or access the confidential information of another.

The implied undertaking is a common law duty (therefore not codified) which prohibits parties from using information obtained during discovery for any purpose other than that for which it was disclosed.²⁶ Such information cannot be used for any purpose which is "collateral or ulterior to the proceedings," except with consent or leave of the Court.²⁷ Breaches of this duty have serious consequences and may be punished with use of the Court's contempt power.²⁸

The Supreme Court of Canada has identified two main rationales behind the implied undertaking rule. First, it "encourages full and frank disclosure

on discovery" by offering protection for parties forced to reveal their private information.²⁹ Parties to a proceeding will be more likely to offer "complete and candid discovery" if they have some assurance that their information will not be misused.³⁰

Second, the implied undertaking rule also recognizes the "general right of privacy" enjoyed by every person with respect to their information.³¹ The discovery process intrudes upon this right for the limited purpose of securing justice in an immediate proceeding.³² By necessary implication, the information disclosed under force of law should be limited to those purposes necessary to the proceeding for which it was disclosed.³³ As stated by Justice Binnie, "whatever is disclosed in the discovery room stays in the discovery room."³⁴

Nevertheless, Canadian Courts retain jurisdiction to set aside the obligations of the implied undertaking rule in "exceptional circumstances."³⁵ Parties may apply to the Court for leave to use information obtained on discovery for purposes beyond the proceeding in which it was disclosed. While leave should only be granted where the privacy interest of the party who disclosed the information is "trumped by a more compelling public interest"³⁶, the breadth of this test threatens one's ability to protect confidential information.

In weighing whether to grant leave, the Court will identify the competing values at stake and balance their relative importance.³⁷ Any perceived prejudice caused to the disclosing party should "weigh heavily in the balance."³⁸ The proposed use of the information will also be significant as Courts are generally reluctant to grant leave when the extraneous purpose is "wholly unrelated" to the original proceeding.³⁹ The onus remains on the applicant to demonstrate that the public interest in disclosure is superior to the party's right to privacy.⁴⁰

The implied undertaking rule does not cease to apply with disposition of the matter in question.⁴¹ Parties

remain bound by the undertaking until ordered otherwise by the Court.

However, the undertaking will cease to apply if the information disclosed during discovery is subsequently referred to at trial.⁴² Once the information is revealed in "open court" it loses the protection of the implied undertaking rule.⁴³

ii) Deemed Undertaking Rule

The deemed undertaking rule is the codification of the implied undertaking rule.⁴⁴ It prohibits parties and their lawyers from using evidence obtained on discovery "for any purposes other than those of the proceeding in which the evidence was obtained."⁴⁵ It too has similar limitations to the implied undertaking rule. Often there is a tension between companies which seek the breadth and clarity of a confidentiality order, and Canadian Courts which prefer to enforce the deemed undertaking.

For example, in *Robinson v. Medtronic Inc.*,⁴⁶ a medical device liability class action, the defendants asked a Canadian Court to issue a confidentiality order that implemented terms of a similar confidentiality order already in place in the United States. They did not succeed.

Justice Perell set out the defendants' position:

[13] The Defendants submit that the protection offered by the deemed undertaking rule is inadequate. They submit that the deemed undertaking does not preclude the filing of discovery materials in the public record for the purposes of interlocutory motions. They submit that the deemed undertaking provides no protection from the misuse of confidential information by experts and third parties who may not be subject to the court's jurisdiction or to the deemed undertaking.

[14] Rather than just relying on the deemed undertaking,

the Defendants seek a confidentiality order, which they submit is not intended to be a sealing order. They submit that at this juncture of the action, it would be unproductive and inefficient to seek a sealing order because that would require an analysis of many documents that ultimately will not be relied on by either party at the common issues trial.

[15] In seeking a confidentiality order, the Defendants propose an order involving: (a) a process for designating documents as confidential in accordance with a enumerative definition that categorizes various types of confidential documents; (b) the specification of persons who may observe the documents (i.e. "Permitted Persons"); (c) the extraction of a confidentiality agreement from some of those observers; (d) a process for advance notice of a party's intention to file a document(s) designated as confidential, which advance notice would allow the other party an opportunity to seek a sealing order if advised to do so; (e) a process for resolving disputes about whether the document(s) is confidential; and (f) an undertaking by the parties to destroy or erase the confidential information after the completion of the litigation.⁴⁷

In answer to the defendants' request for a confidentiality order, which was refused, the Court found that the deemed undertaking rule, with some refinement, was sufficient to protect the defendants' confidential information.⁴⁸

Justice Perell modified the deemed undertaking rule in the following ways:

1. The deemed undertaking rule was held to apply to any *form of*

disclosure during the procedure, not just the enumerated discovery rules set out in the provision.

2. The deemed undertaking rule would apply not just to the parties and counsel *but also to employees, agents, consultants, experts, and service providers coming into contact with the information.*
3. Counsel would not be permitted to distribute the confidential material to all plaintiffs named in the class action. The order would protect counsel from any allegations that they breached professional obligations by not disclosing documents to class members

Justice Perell's reasoning for making the refinements provides excellent insight into why a Canadian Court refused to adopt a confidentiality order already in place in the United States. Justice Perell deemed that order to be "both unnecessary and unsatisfactory."⁴⁹

We review a few of the key factors in his reasoning:

1. Canadian Courts have rejected the American approach of allowing any use to be made of documents obtained on discovery unless the party being discovered obtains an order prohibiting a particular use.
2. The Canadian approach to the deemed undertaking that prohibits a collateral use of disclosed documents is considered by Canadian Courts (but generally not by Counsel or clients) to be more proficient and efficient.
3. The deemed undertaking focuses its attention on privacy rather than confidentiality which is intended to remove the need for any definition of what constitutes a confidential document and to avoid the difficulties of having to determine whether any particular document would satisfy the stipulated definition or equity or the common law's criterion for confidentiality.
4. The focus on privacy is not intended to interfere with whatever rights the parties may have acquired by

contract or under the law of breach of confidence: it is meant to provide for a broader scope of protection.

5. The rationale is the promotion of full discovery without fear of collateral use of the information. Justice Perell concluded: "Encouraging disclosure of the documents relevant to a claim or defence is important to the Court's ability to provide access to justice and a just and true determination of the case."⁵⁰

It is interesting that Justice Perell refused to implement terms similar to the American confidentiality order already in place, and then acknowledged that his modifications to the deemed undertaking rule were necessary because the rule contains some very significant exceptions which weaken its restrictions.⁵¹

First, the deemed undertaking does not apply to evidence which is filed or referred to in Court. This exception to the rule provides an easy way to avoid its application: one can simply file the evidence in Court, as part of a motion or other pre-trial maneuver, which then places it within the public domain, and makes it accessible to any interested party.

Second, it does not prohibit use of the evidence in subsequent proceedings for the purpose of impeachment in unrelated actions.⁵²

Third, a Canadian Court may also order that the undertaking does not apply where "the interest of justice outweighs any prejudice that would result to a party who disclosed evidence."⁵³

Given the breadth of the exceptions, and the ease one can avoid its application, we conclude it is insufficient to rely upon this rule to protect one's confidential information without extending its application by Court Order.

E. Aggressively Protect Your Confidential Information

The implied and deemed undertakings provide some protection for confidential information and trade

secrets subject to disclosure on discovery. However, they are limited in scope and may not be sufficient protection for information held by parent companies.

Therefore, we advocate a more aggressive approach to protect confidential information: injunctive relief against those who may disclose, confidentiality and sealing orders to protect parties already in litigation, and agreements which are generally respected by our Courts, and which set out the terms of protection prior to conflict arising.

i) Interim and Permanent Injunctions

Parent companies may seek interim or permanent injunctions which prohibit the “continued misuse or disclosure of confidential information.”⁵⁴ Once granted, these injunctions are highly effective and can be enforced with use of the Court’s contempt power. However, this discretionary measure is often difficult to obtain.⁵⁵

Injunctions will not be ordered unless the Court believes there is “a real danger” that one of the parties intends to use or communicate the information.⁵⁶ The Court will also refuse injunctive relief if the harm caused could be adequately remedied with damages.⁵⁷ Parties seeking an injunction must demonstrate compliance with three conditions:

1. upon a preliminary assessment of the merits there is a serious question to be tried,
2. the party seeking the injunction would suffer irreparable harm if the application were refused,
3. the party seeking the injunction would suffer greater harm from refusal of the order than the other parties would if the order is granted.⁵⁸

Given the difficulty of meeting these requirements, injunctive relief is not the ideal solution for parent companies seeking to protect their information.⁵⁹ If the company cannot demonstrate that the information is something “very special” which

requires a higher level of protection, it is unlikely an injunction will be granted.⁶⁰

However, where it appears that disclosure of confidential information will result in irreparable harm, this relief (although costly) can afford protection on short notice against deliberate disclosure.

ii) Confidentiality and Sealing Orders

Confidentiality orders are another method by which parent companies may protect their information. The Ontario *Courts of Justice Act*⁶¹ confers authority on Ontario Courts to order that documents filed in a proceeding be “treated as confidential, sealed and not form part of the public record.”⁶² Canadian Courts also retain inherent discretion to grant confidentiality orders where necessary.⁶³

Such orders can be obtained in cases where there is a risk that confidential information, trade secrets or commercially sensitive data may be divulged. They are a useful tool for persons seeking to limit the scope of pre-trial discovery, as stated by Justice Binnie:

The practical effect is that the courts routinely make confidentiality orders limited to pre-trial disclosure to protect a party or person being discovered from annoyance, embarrassment, oppression, or undue burden or expense.⁶⁴

The Court’s objective when making such an order will be “to achieve a fair adjudication of the issues raised in the pleadings” while at the same time minimizing disclosure to that which is necessary.⁶⁵ This requires a careful balancing between the probative value of the disclosure and the adverse affects which may occur to the party releasing the information.⁶⁶

In Federal Court, where most actions are case managed, one cannot assume that a confidentiality order will be granted. Despite the above quote

by Justice Binnie, it is our practical experience that confidentiality orders are not “routinely made.” They must be strategically negotiated and justified to the Court.

Recall that in *Robinson* Justice Perell refused to grant the order as requested by Medtronic, concluding it was “both unnecessary and unsatisfactory.”⁶⁷

Practically, there are a few considerations that assist one in obtaining a confidentiality order. The following are a few successful strategies employed to obtain confidentiality orders in Federal and Superior Court:

1. The confidentiality order should be discriminating (not all documents in the action will be confidential):
 - a. Define what information is confidential;
 - b. Set out a process to identify information not yet produced to be designated as confidential;
 - c. Designate how documents will be marked confidential; and
 - d. Identify the persons who are able to review and receive confidential information and set out a process by which those persons will be provided confidential information.
 - e. Implement a process for discussion between Counsel, and enumerate the repercussions for failure to comply (and ensure that those repercussions are enforceable within the Canadian legal system or by arbitration).
2. Where possible, negotiate consent of the other parties to the form of the confidentiality order before asking the Court to grant the order.

By following the above, the probability of obtaining a confidentiality order increases. As soon as one obtains a confidentiality order in Canada, the order should be made enforceable in the appropriate state, if possible, so that it applies to cross-border disclosure in both Canada and the United States.

We differentiate here between confidentiality orders and sealing orders

but acknowledge that many Courts use the terms interchangeably. Here, we refer to a sealing order as an order where the Court file is sealed from the public. Therefore, where a higher degree of protection is required, the Court may grant a sealing order preventing members of the public from hearing or accessing information...⁶⁸ In contrast, a confidentiality order usually creates two streams of documents: those that are produced in the ordinary course of litigation, and those that are designated as confidential and produced only to certain designated persons.

Canadian Courts view sealing orders to be a negative impact on the constitutional right to freedom of expression and an exception to the general rule that Courts should be open to the public.⁶⁹ As a result, Canadian Courts are generally unwilling to grant a sealing order unless necessary under the circumstances.⁷⁰

iii) Confidentiality and Non-Disclosure Agreements

Another option for American companies is the conclusion of confidentiality and non-disclosure agreements. When information or documents are requested on discovery, parent companies may require as a condition of disclosure that those people accessing the material sign

agreements preventing them from misusing or disclosing any confidential information.

While the breadth of describing such agreements exceeds this paper, it is important to consider that the implementation of such an agreement will be generally recognized by our Court. Therefore, where one is doing cross border business and one has confidential information or trade secrets to protect, the implementation of such agreements should be considered at all material times.

Our Courts have recognized such agreements as a valuable method of ensuring that sensitive information obtained on discovery is not disclosed.⁷¹ As stated in *Spar Aerospace Limited v. Aerowerks Engineering Inc.*⁷²:

[E]ven in Canadian practice, the implied undertaking should be shored up by contracts with the various persons and individuals to whom the disclosure of confidential records may be made with a view to extending to them the undertaking that binds the parties' and the parties' lawyers.⁷³

Of course, these agreements will be most effective when incorporated into a confidentiality order. Parent companies may request that our

Courts provide for the conclusion of confidentiality and non-disclosure agreements prior to release of the information. Including such agreements in a Court order will emphasize the seriousness of the obligation not to disclose the information and may be an influential factor in the event a sealing order is requested.⁷⁴ It may also make it easier to enforce such agreements should improper disclosure occur.

F. Conclusion

Information obtained during pre-trial discovery is protected by the "implied" and "deemed undertaking" rules which are intended to prohibit improper use or disclosure of such information. However, these rules provide insufficient protection for companies possessing highly valuable trade secrets or commercial information. The most effective safeguards to prevent disclosure are agreements and orders obtained at the earliest stages of litigation which include non-disclosure agreements, confidentiality agreements, confidentiality orders, and sealing orders. Using the appropriate strategies can increase one's ability to obtain this protection from disclosure, and ensure that the Canadian company is able to meet its production obligations within the litigation process. 🍁

Endnotes

1. With appreciation for the research and cite checking by Alana Penny, Summer Student at Gowlings.
2. *Cadbury Schweppes Inc v. FBI Foods Ltd*, [1999] 1 SCR 142 at para 75 [*Cadbury Schweppes*]. See also Christopher C. Van Barr, "How to Better Protect Your Trade Secrets: An Update on U.S. Case Law and A Comparison to Canadian Trade Secret Law" (Paper presented to the American Bar Association 2011 Annual Meeting, 5 August 2011) at 2.
3. *Coco v. AN Clark (Engineers) Ltd.*, [1969] RPC 41 at 47 [*Coco*]; *Cadbury Schweppes*, *supra* note 2 at para 75.
4. *Lac Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 SCR 574 at para 58 [*Lac Minerals*], citing *Saltman Engineering Co v. Campbell Engineering Co* (1948), 65 RPC 203 at 215 (CA).
5. *Coco*, *supra* note 3 at 47.
6. *Seager Ltd v. Copydex Ltd (No 2)*, [1967] 2 All ER 415 (CA) [Seager].
7. *Coco*, *supra* note 3 at 47.
8. *GasTOPS Ltd. V. Forsyth*, [2009] OJ No 3969 (Ont. Sup. Ct. J.) at para 119 [*GasTOPS*].
9. *Ibid* at para 120; *Faccenda Chicken Ltd v. Fowler*, [1986] 1 All ER 617 at 625 (CA); Van Barr, *supra* note 2 at 3.
10. *GasTOPS*, *supra* note 8 at paras 119-120; Todd J. Burke & Sophia Zahariadakis, "Economic Torts and Causes of Action in the Competitive context" [unpublished] at 23.
11. *GasTOPS*, *supra* note 8 at para 121, citing *CPC International Inc v. Seaforth Creamery Inc*, [1996] OJ No 3393 at para 22 (Ont Ct J (Gen Div)) [*CPC International*]; *Andersen v. St. Jude Medical*, 2010 ONSC 5191 at para 13 [*Andersen*]; *Areva NP GmbH v. Atomic Energy of Canada Limited*, [2009] OJ No 4372 at para 33 (Ont Sup Ct J) [*Areva*].

12. *GasTOPs*, *supra* note 8 at para 121, citing *CPC International*, *supra* note 11 at para 22.
13. *GasTOPs*, *supra* note 8 at para 124.
14. *Areva*, *supra* note 11 at para 23, citing *RI Crane Limited v. Ashton and Ashton Press Manufacturing Company Ltd*, [1949] OR 303 (HC) aff'd [1950] OR 62 (CA).
15. *Kitchenham v. Axa Insurance Canada*, 2008 ONCA 877 at para 10 [*Kitchenham*].
16. *Juman v. Doucette*, [2008] 1 SCR 157 at para 20 [*Juman*].
17. *Ibid* at para 24.
18. RRO 1990, Reg 194 [*Rules of Civil Procedure*].
19. *Ibid* at Rule 30.02(1).
20. *Ibid* at Rules 30.02(2) and 30.04.
21. *Ibid* at Rule 30.02(4).
22. *Ibid* at Rule 30.10(1).
23. *Scienton Technologies Inc v. Canadian Imperial Bank of Commerce*, [2009] OJ No 2359 [*Scienton*].
24. *Ibid*.
25. *Farris v. Staubach Ontario Inc et al*, 2006 CanLii 19456 (Ont Sup Ct).
26. *Goodman v. Rossi*, 24 OR (3d) 359 at para 1 (Ont CA) [*Goodman*]; *Juman*, *supra* note 16 at para 4.
27. *Goodman*, *supra* note 26 at paras 1, 12; *Juman*, *supra* note 16 at para 26.
28. *Goodman*, *supra* note 26 at para 25; *Juman*, *supra* note 16 at para 29.
29. *Kitchenham*, *supra* note 15 at para 30; *Juman*, *supra* note 16 at para 26.
30. *Juman*, *supra* note 16 at para 26.
31. *Goodman*, *supra* note 26 at para 23; *Juman*, *supra* note 16 at para 24.
32. *Goodman*, *supra* note 26 at para 23.
33. *Juman*, *supra* note 16 at para 25; *Kitchenham*, *supra* note 15 at para 30; *Goodman*, *supra* note 26 at 36.
34. *Juman*, *supra* note 16 at para 25. See also *Goodman*, *supra* note 26 at para 36 and *Kitchenham*, *supra* note 15 at para 31.
35. *Juman*, *supra* note 16 at para 30.
36. *Ibid* at paras 30, 33; *Kitchenham*, *supra* note 15 at para 57.
37. *Juman*, *supra* note 16 at para 33.
38. *Ibid* at para 33.
39. *Ibid* at para 36.
40. *Ibid* at para 38.
41. *Ibid* at para 51.
42. *Ibid* at para 21.
43. *Ibid* at para 21.
44. *Kitchenham*, *supra* note 15 at para 28.
45. (Ontario) *Rules of Civil Procedure*, *supra* note 18 at Rule 30.1.01(3).
46. *Robinson v. Medtronic Inc*, 2011 ONSC 3663 [*Robinson*].
47. *Ibid* at paras 13-15.
48. *Ibid*.
49. *Ibid* at para 34-52.
50. *Ibid* at para 40.
51. (Ontario) *Rule of Civil Procedure*, *supra* note 18 at Rule 30.1.01(7).
52. *Ibid* at Rule 30.1.01(6).
53. *Ibid* at Rule 30.1.01(8).
54. John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2003) at pgs 32-36; *Cadbury Schweppes*, *supra* note 2 at para 78. For further discussion see Van Barr, *supra* note 2 at 7.
55. Van Barr, *supra* note 2 at 8.
56. McKeown, *supra* note 54 at 32-37.
57. *Ibid* at 32-36. *Cadbury*, *supra* note 2 at para 87-88.
58. *RJR MacDonald Inc v. Canada (Attorney General)*, [1994] 1 SCR 311 at para 43.
59. For example, see *Cadbury Schweppes*, *supra* note 2.
60. *Ibid* at paras 83-86.
61. *Courts of Justice Act*, RSO 1990, c C-43 [COJA].
62. *Ibid* at s 137(2).
63. *CPC International*, *supra* note 11 at para 34; *Shaw (Rodgers) v. Shaw (Titus)*, 2007 CanLII 56500 at para 15 (Ont Sup Ct J) [*Shaw*].
64. *Juman*, *supra* note 16 at para 28.
65. *CPC International*, *supra* note 11 at paras 27, 33.
66. *Ibid* at para 35; *Shaw*, *supra* note 63 at para 4.
67. *Robinson*, *supra* note 46 at para 34.
68. For example, see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra*] and *Andersen*, *supra* note 11.
69. McKeown, *supra* note 54 at 32-46.
70. *Sierra*, *supra* note 68 at paras 53-54.
71. *Spar Aerospace Limited v. Aeroworks Engineering Inc*, 2007 ABQB 543 at para 47, aff'd 2008 ABCA 47.
72. *Ibid*.
73. *Ibid*.
74. McKeown, *supra* note 54 at 32-48; *Andersen*, *supra* note 11 at para 12.