DISCOVERY OBLIGATIONS GOVERNING THE USE OF SURVEILLANCE IN PERSONAL INJURY CASES IN ONTARIO

Jim Davidson and Adrian Reyes

WILL DAVIDSON LLP

Toronto, Ontario

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Introduction

Surveillance of an opposing party is typically used at the trial of a personal injury case for the following purposes:

- as *substantive* evidence (*e.g.* - of the opposite party's functional abilities); or
- as *impeachment* evidence (*e.g.* - to undermine the opposite party's credibility)

This paper deals with the disclosure obligations that govern the use of such surveillance in Ontario.

Substantive Evidence

Briefly speaking, surveillance that is intended to be used as substantive evidence at trial must be produced to the opposite party at least 90 days before the commencement of trial (see Rule 30.09 of the Ontario *Rules of Civil Procedure* and the Ontario Court of Appeal decision in *Landolfi v. Fiargone*) or with leave of the Court (see Rule 53.08 of the Ontario *Rules of Civil Procedure*)

Impeachment Evidence

By contrast, surveillance that is intended to be used as impeachment evidence need not be produced but must be disclosed in Schedule "B" of the party's Affidavit of Documents. The decision in *McDonald v. Standard Life Assurance Co.* states that if privilege is maintained over this new surveillance then there is no need to serve a supplemental Affidavit of Documents. However, such a position would seem to run contrary to basic disclosure principles.

In addition, if requested, the party intending to rely on the surveillance must also provide the opposite party with the following information (see the Ontario General Division decision in *Devji v. Longo Brothers Fruit Market Inc*.):

1. dates, times and precise locations
2. particulars of the activities and observations made;
3. the names and addresses of the persons who conducted the surveillance.

The following discussion elaborates on these disclosure principles and reviews the current Ontario law pertaining to the use of Surveillance at trial.

Discussion

The use of surveillance evidence in the judicial system is subject to the law of evidence as well as the *Courts of Justice Act* and the *Rules of Civil Procedure*. The combined reading of these laws is necessary in ascertaining the role surveillance evidence plays in a civil trial and the discovery obligations associated with it. Surveillance evidence is governed under Rule 30.09 of the *Rules of Civil Procedure* as a "document" on which counsel claims privilege.

Counsel seeking to use surveillance evidence at trial must take into consideration the three options available to her under the *Rules.* Under Rule 30.09:

> **PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE**
>
> 30.09 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. R.R.O. 1990, Reg. 194, r. 30.09; O. Reg. 19/03, s. 7.

Rule 30.09 thus gives defence counsel three options in their approach to the use of their surveillance evidence:

1. Claim litigation privilege over the surveillance evidence, list such in the Affidavit of Documents Schedule "B" and apply a wait and see approach to its use.

2. Waive privilege over the surveillance evidence more than 90 days before trial, disclose to opposing counsel and subsequently use as substantive evidence at trial.

3. Retain privilege over the surveillance evidence, do not disclose (other than in Schedule "B") and use to impeach evidence of Plaintiff at trial subject to a finding of admissibility.

4. Pursuant to Rule 53.08 seek admission of the surveillance evidence as substantive evidence under Rule 30.09 with leave of the trial judge.

Discovery Obligations

Inclusion and description in the Affidavit of Documents is the minimum required disclosure of surveillance evidence.

Under Rule 30, parties in a civil action are required to disclose the existence of surveillance documents in their Affidavit of Documents. This disclosure includes reports, photographs, video recordings, DVDs and the like.

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

Surveillance documents over which counsel claims privilege are invariably listed in Schedule ¨B¨.

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(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 for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. R.R.O. 1990, Reg. 194, r. 30.03 (2); O. Reg. 438/08, s. 27 (2).

Surveillance evidence over which privilege is not claimed is subject to inspection by the opposing party upon notice and the time of inspection must be set within five days of such notice.

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

In *Walker v.Woodstock*[1], the Divisional Court clearly stated that the Defendant must disclose a summary of the surveillance during the discovery process whether or not such surveillance is tendered for substantive or impeachment purposes. The Superior Court of Justice has provided some further guidance as to the suitability of disclosure of surveillance evidence in an Affidavit of Documents. In *Marchese v. Knowles*,[2] the Defendant claimed privilege over a surveillance report in Schedule ¨B¨ of its Affidavit of Documents that neglected to include the existence of field/log notes. Cavarzan J. in ordering a the delivery of a further and better Affidavit of Documents, relied on *Devji v. Longo Brothers Fruit Market Inc*.[3] where it was stated, at para. 4, that the "defendant in a personal injury accident is obliged to provide details of surveillance including:

"1. dates, times and precise locations

2. particulars of the activities and observations made;

[1] *Walker v. Woodstock*, 2001 CarswellOnt 113, 142 O.A.C. 53, 7 C.P.C. (5th) 176 at paras. 8,12.
[2] *Marchese v. Knowles*, 2009 CanLII 12116 (ON SC).
[3] *Devji v. Longo Brothers Fruit Market Inc.,* [1999] O.J. No. 1542 (Ont. Ct. Gen. Div.) at para 4.

3. the names and addresses of the persons who conducted the surveillance."

The Superior Court in *Marchese* reinforces the standard of sufficiency for disclosure of surveillance evidence in the Affidavit of Documents. As well, it appears that the opportunity exists for Plaintiffs to immediately challenge completeness under Rule 30.08 or utilize the examination for discovery as a tactical tool to identify deficiencies in the Affidavit of Documents and subsequently request an Order for a further and better Affidavit as seen in *Marchese.*

The Affidavit of Documents triggers Rule 30.07

A properly executed Affidavit of Documents is of benefit to counsel in two ways. Firstly, the Affidavit of Document is the only concrete means to identify the existence of surveillance. Secondly, a properly executed and served Affidavit of Documents should trigger Rule 30.07, assigning an ongoing disclosure duty to the Defendant including the existence of new or previously undisclosed surveillance evidence:

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. R.R.O. 1990, Reg. 194, r. 30.07.

Litigation Privilege over Surveillance Evidence can be Challenged

Although the Plaintiff has a further opportunity in the examination for discovery process to elicit further information regarding the surveillance evidence, it is possible to challenge the Defendant´s claim of privilege from the outset. The Court of Appeal in *General*

Accident Assurance v. Chrusz[4] has unequivocally endorsed the Defendant´s right to claim privilege over surveillance evidence whose dominant purpose was that of litigation whether actual or anticipated. However, the Defendant may waive its privilege actively or by inference in a variety of circumstances:

1. Provision of surveillance evidence to a defence expert: *Aherne v. Chang,* (2011) O.J. No. 1880 (S.C.J.), *Browne v. Lavery*, (2002) O.J. No. 564;

2. Disclosure of surveillance evidence to a co-defendant: *Tremblay v. Daum* (1994) (Ont. Gen. Div.), *Columbos v. Carroll* (1985) (Ont. H.C.J.);

3. Provision of surveillance evidence to a third-party: *Supercom of California v. Sovereign General Insurance Co.* (1998) (Ont. Gen. Div.).

As well, the Court retains its statutory right under Rule 30.04(6) to act as the ultimate assessor of privilege:

> **Court may Inspect to Determine Claim of Privilege**
>
> 30.04 (6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. R.R.O. 1990, Reg. 194, r. 30.04 (6).

Examinations for Discovery

The discovery obligations surrounding surveillance evidence extend from the Affidavit of Documents to the examinations for discovery. The examination stage is an important tactical device for the Plaintiff to evince further particulars about surveillance evidence in the Defendant´s possession.

Rule 31.06 governs the scope of examination and puts an obligation on the Defendant:

> **SCOPE OF EXAMINATION**

[4] *General Accident Assurance v. Chrusz*, (1999), 45 OR (3d) 321 (CA).

General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

In *Sacrey v. Berdan*[5], the court clarified the important difference between document discovery as governed by the Affidavit of Documents and informational discovery as subject to the rules of examination.

11. 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..

...

17. The whole range of informational discovery is governed by r. 31.06(1), which constitutes a very broad rule as to its scope. It permits "any proper question relating to any matter in issue in the action ..." The plaintiff's injuries are a "matter in issue" in this case. Therefore, any information "relating" or relevant to the plaintiff's injuries known by the defendant is properly within the scope of informational discovery. Indeed, the paradigm of such information is what the plaintiff was observed to do by a witness undertaking surreptitious surveillance of

[5] *Sacrey v. Berdan*, 1986 CarswellOnt 353, 10 C.P.C. (2d) 15, 38 A.C.W.S. (2d) 296.

> the plaintiff. Such information is necessary to enable plaintiff's counsel to know the case he has to meet and to avoid surprise at trial. It may also assist plaintiff's counsel in lowering, or increasing, his expectations of the worth of the plaintiff's injuries and may promote settlement of her case.

The court in *Sacrey* quoted with approval at para. 15 the comments of Osborne J. in *Niederle v. Frederick Transport Ltd.*[6]:

> At the examination for discovery counsel for the defendants undertook to inform the plaintiff's counsel of information subsequently acquired going to the issues in the case which included the nature and extent of the plaintiff's injuries. Based upon this undertaking and "the Rules as they now stand relating to discovery disclosure", Osborne J. held at p. 138 that:
>
> > "the defence must disclose not only surveillance activities resulting in evidence that it may or does wish to lead at trial, but also surveillance activity that did not result in evidence upon which the defence relies or may rely."

The Court of Appeal subsequently rendered its decision on the sufficiency of the Defendant´s disclosure of surveillance evidence during examinations for discovery again distinguishing document discovery from informational discovery. In *Ceci v. Bonk*[7] the Defendant refused to attend examination in an attempt to avoid disclosing particulars about privileged surveillance evidence. Carthy J.A. ordered the Defendant´s attendance at the examination to answer questions about the surveillance evidence despite its privilege.

Clearly, despite claims of privilege over surveillance evidence, Plaintiff´s counsel can utilized the Examination for Discovery as a tactical tool to leverage informational discovery to identify particulars regarding privileged surveillance evidence. As well, the Plaintiff´s right to discover Defendants first, provides an opportunity for the well-prepared Plaintiff´s counsel to identify the particulars of privileged surveillance evidence before their examination.

Privileged Surveillance

[6] *Niederle v. Frederick Transport Ltd*., (1985) 5 C.P.C. (Ont. H.C.J.).
[7] *Ceci v. Bonk,* 1992 CarswellOnt 432, 6 C.P.C. (3d) 304, 7 O.R. (3d) 381, 89 D.L.R. (4th) 444, 56 O.A.C. 346.

Although production is not required of privileged surveillance at the documentary discovery stage, during examinations the Plaintiff may utilize the principles of informational discovery to identify dates, times, locations and descriptions of the activities covered in the surveillance. As well, prior to examinations interrogatories may be issued regarding this information.

Disclosed Surveillance

If privilege has been waived over surveillance evidence, during examinations a Plaintiff may use the strategy in *Marchese* and focus its examination on the existence of collateral documents, records and notes utilized in preparing the surveillance report. As well the issue of pixilation may be germane to the case and particulars about editing techniques may be asked.

Whether the surveillance evidence is privileged or disclosed, upon examining the Defendant on the surveillance evidence Rule 31.06 (2) supports both strategies:

Identity of Persons Having Knowledge

> 31.06 (2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.06 (2).

As well, once the Defendant has been examined regarding surveillance evidence, Rule 31 is engaged and obliges continuing disclosure:

INFORMATION SUBSEQUENTLY OBTAINED

Duty to Correct Answers

> **31.09** (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
>
> (a) was incorrect or incomplete when made; or
>
> (b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).

When Privilege over Surveillance Evidence is Lost.

An important consideration in the Discovery portion of litigation is the retention of privilege over surveillance documents. Simply asserting privilege is not enough to safeguard the fruits of that privilege from documentary discovery.

In *Bazinet v. Davies Harley Davidson*[8] The Superior Court has stated that expert surveillance reports are privileged where the surveillance and the report are crafted by the same expert or entity or where a subsequent expert relies on the findings of the first expert. However, Power J. quoting with approval Ferguson J. at para. 25 in *Browne*, affirms that litigation is waived albeit not expressly "… If some of the information in the document is disclosed then the privilege in the entire document is waived." [9]

Most recently, the Superior Court in *Ahern v. Chang* on an appeal from a decision of Master Short[10], revisited *Bazinet* and addressed the precise moment when waiver of privilege over surveillance documents crystallized. Distinguishing the point of crystallization in *Bazinet,* the Court found that waiver of privilege crystallized not at the point counsel decided to rely on the report of the second expert, but rather at the point the surveillance documents were voluntarily produced to the expert. The Court held that the waiver of litigation privilege associated with surveillance evidence is a consequence of the operation of s. 105 of the *Courts of Justice Act*, and Rules 33.04(2), 33.06 (1), and 53.03 of the *Rules of Civil Procedure*. These provisions, when read together, unmistakably require the waiver of privilege for any information provided to a defence medical examiner. It remains to be seen though if this ruling can be extrapolated to all experts or if the later point of crystallization in *Bazinet* remains in place for other experts.

[8] *Bazinet v.Davies Harley Davidson*, 2007 CanLII 23158 (ON SC).
[9] He relied on the Supreme Court of Canada decision in *R. v. Stone* 1999 CanLII 688 (SCC), (1999), 134 C.C.C. (3d) 353.
[10] *Ahern v. Chang*, 2011 ONSC 2067 (CanLII).

Surveillance Evidence at Trial

Substantive Evidence

Counsel planning to use surveillance evidence as substantive evidence in a civil trial must first disclose such evidence in Schedule A of its Affidavit of Documents or abandon privilege over the documents greater than 90 days prior to trial. Subject to Rule 30.09, surveillance evidence not properly disclosed is limited to use as impeachment evidence except by leave of the trial judge. Rule 30.09 has been strictly enforced in Ontario: *Youssef v. Cross*[11]; *Giroux v. LaFrance*[12].

In *Youseff*, Granger J. provides an elucidation of Rule 30.09 in situations where Defence counsel strategizes on how best to utilize surveillance evidence[13]:

> ¨Accordingly, if the video is to be used to impeach the evidence of the plaintiff, it need not be produced but if the video is to be used as substantive evidence the privilege must be waived and the video produced in order to comply with the rules of civil procedure. Admittedly the defendant is faced with a dilemma as production of the video might detract from the effect of the impeachment process. The present rules of civil procedure, are designed to facilitate production of documents including videos, if they are to be used as real evidence, in order to avoid what has commonly been referred to as "trial by ambush". It seems to me that if the videos are to be used as substantive evidence, the privilege must be waived and production made prior to trial. The use of the videos by Dr. Girvin to form an opinion that the plaintiff is a malingerer, demonstrates the unfairness resulting from the failure to produce the video as Dr. Clifford, a physiatrist retained by the plaintiff, was not aware of the videos until he was called as a witness by the plaintiff.¨

Landolfi v. Fargione[14], one of the leading cases on surveillance evidence at trial approves *Youseff and Giroux* and further advises that the test for admission of surveillance evidence at trial is Rule 30.09 and its exceptions:

> "Rule 30.09 sets out strict procedural requirements where a party seeks to use a privileged document at trial as substantive evidence in its case. These requirements oblige the party who seeks to use the evidence to abandon its

[11] *Youssef v. Cross* (1991), 80 D.L.R. (4th) 314 (Ont. Gen. Div.).
[12] *Giroux v. LaFrance*, (1993), 19 C.P.C. (3d) 12 (Ont. Gen. Div.).
[13] *Supra* note 11 at para. 10.
[14] *Landolfi v. Fargione*, 2006 CanLII 9692 (ON CA)

previously asserted privilege claim in writing and to produce the "document" for inspection not later than 90 days before the commencement of the trial. Under rule 30.01(1)(a), a "document" includes a videotape. Thus, rule 30.09 contemplates production before trial of a privileged document, for its eventual use at trial, where a party intends to use the document as substantive evidence.¨[15]

Most recently in *Smith v. Morelly*[16], the Superior Court again affirmed at para. 28 the strict approach of Rule 30.09 subject to Rule 53.08:

> ¨I do not find that it is reasonable to allow the Defendant to use the videotape as substantive evidence in this case. I agree with the Plaintiff that the rules with respect to disclosure have been put in place for specific policy reasons. They are to be strictly adhered to.¨

However, counsel should be aware that the *Ball v. Vincent*[17] test for admissibility of surveillance evidence may still be applicable in cases where such evidence having already been disclosed to the Plaintiff is tendered by the defence as both substantive evidence and for impeachment purposes subject to the relevance threshold:[18]

> "The criteria which are accepted to be applicable to an issue concerning the admissibility of videotapes are those identified in the decision *R. v. Creemer and Cormier* (1968), I C.C.C. p. 14. The criteria are firstly, accuracy in representing the facts; secondly, fairness and absence of any intention to mislead and thirdly, verification on oath by a person capable of doing so. In addition, of course, the videos to be admissible must have real probative value in relation to an issue at this trial.¨ [19]

Impeachment

When the Defendant decides to maintain privilege over the surveillance documents, such evidence may be used to impeach the Plaintiff´s testimony under the Rule 30.09 exception. However, in advance of use at trial, the threshold common law rule in *Brown v. Dunn* must be met. *Brown* requires defence counsel to lay the

[15] *Supra* at para. 46.
[16] *Smith v. Morelly*, 2011 ONSC 6834 (CanLII).
[17] *Ball v. Vincent* (1993), 24 C.P.C. (3d) 221 (Ont. Ct. (Gen. Div.)).
[18] *Ferenczy v. MCI Medical Clinics* 2004 CanLII 12555 (ON SC), (2004), 70 O.R. (3d) 277 (Sup. Ct. J.) at para. 18.
[19] *Supra* note 17 at para. 5.

proper evidentiary foundation prior to calling impeachment evidence. In *Giroux*, Valin J. applying *Brown* to surveillance documents found that surveillance cannot be used to ambush the Plaintiff but rather counsel must present the substance of the evidence and allow the Plaintiff the opportunity to deny, explain or call evidence to rebut it.

In *Landolfi*, the test for admissiability of surveillance as impeachment evidence was found not to be the strict standard for substantive evidence under Rule 30.09 but rather one of relevance:

> ¨where evidence is tendered for impeachment purposes (as in this case) the admission of the evidence requires a showing of relevance to the credibility of a witness on a material matter and a further demonstration that the potential value of the proffered evidence to assist in assessing credibility outweighs the potential prejudicial effect of the evidence.¨

Such relevant evidence albeit with minor modifications must accurately and fairly encapsulate the information the defence proffers to the court or it may be deemed inadmissible.[20] Where the evidence is not relevant to impeaching the Plaintiff´s oral evidence, it may be excluded and is subject to the trial judge´s qualification of relevance on the facts. In *Lis v. Lombard*[21], Bryant J. held that the proferred impeachment evidence did not contradict the oral testimony of the Plaintiff and refused to admit surveillance evidence which might be mischaracterized as substantive evidence by the jury:

> ¨21 A prior inconsistent statement or inconsistent/contradictory conduct is a well-recognized basis of impeachment. The plaintiff's evidence at her examination for discovery and at trial is consistent concerning who did the shopping. The activity depicted on the videotape is consistent with her evidence given at trial concerning shopping on her days off. I find that the proffered surveillance videotape does not contradict Mrs. Lis's answers made at discoveries or her evidence at trial. I find that the surveillance videotape is not admissible because it is not relevant to the credibility of the witness Mrs. Lis as to whether or not she suffers chronic pain as a result of the accident.¨

[20] *Supra* note 17.
[21] *Lis v. Lombard*, 2006 CanLII 21595 (ON SC).

A finding of relevance to the credibility of the Plaintiff when classifying surveillance evidence for impeachment purposes is again the role of the trial judge. In *Howe v. Garcia*[22], the court came to the opposite decision than in *Lis* when applying the *Landolfi* test. Walters J. found that the surveillance tapes in question could not be admitted as substantive evidence but were admissible for impeachment purposes. Madam Justice Walters found the surveillance was relevant to contradicting the Plaintiff´s evidence that she was incapable of performing daily tasks to the degree professed in oral testimony.

Furthermore, as in *Smith v. Morelly*, where the defence seeks to utilize surveillance for impeachment but has failed to disclose subject to Rule 30.09, once a judge is satisfied that the surveillance will "contradict, impugn or challenge the testimony of the Plaintiff"[23] the evidence may be admitted by leave pursuant to Rule 53.08.

In *Landolfi*, addressing the challenge of perfect disclosure, the court quoted approvingly Carthy J.A.´s characterization of the important interplay between rules 30.09, 31.06(1) and 30.03 in *Ceci* at pp. 383-84:

> I do not read [rule 30.09] as inconsistent with the principle of full exchange of information at all stages of an action. The [impeachment] exception [under rule 30.09], in my view, is a simple acknowledgement that a party, unable to anticipate everything that may be said by an opponent at trial, cannot be expected to relinquish privilege and give notice of documents on the mere chance that they may be used to impeach. Any suggestion of ambush being encouraged is dispelled by the necessary inclusion of the 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 at trial.

[22] *Howe v. Garcia*, 2008 CanLII 48136 (ON SC).
[23] *Supra* note 16 at para. 20.

However, where such surveillance evidence is collected in a manner perverse to the Rules of Civil Procedure notwithstanding their relevance, a judge may elect to exclude the evidence. However, upon the admission of any surveillance evidence for impeachment, the proper charge to the jury is imperative to avoid mischaracterization as substantive evidence.

Conclusion

The case law shows that counsel must elect tactically the role surveillance evidence will play early in the litigation process. Producing such evidence early runs the risk of the opposing part mitigating the damage the evidence would pose at trial. However, retaining privilege over such evidence in the hopes of leveraging its impeachment value runs the real risk of falling short of the relevance threshold as failing to contradict the oral testimony of the opposing party at trial. Whichever strategy counsel uses should be predicated on the knowledge that the barriers of privilege can be overcome by an effectively planned and executed examination. The lesson recently illustrated in *Ahern* is that counsel should not take privilege as a given and should be very aware at each point in the litigation process of the possibility that privilege over surveillance documents could be unexpectedly lost.