

Recent Case Law on the Disclosure of Surveillance Evidence

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This paper offers an overview of recent case law regarding the disclosure of surveillance evidence and its admissibility at trial, both for substantive and impeachment purposes. It first outlines the 2015 Ontario Court of Appeal decision, *Iannarella v. Corbett*,¹ where the court stressed the importance of pre-trial disclosure to avoid a “trial by ambush” and to promote early settlement and resolution. It then highlights how the ruling on early disclosure of surveillance evidence in *Iannarella* has been used in subsequent cases.

The Court of Appeal in *Iannarella*:

In *Iannarella*, the plaintiff was rear-ended in snowy conditions on a busy highway, resulting in alleged serious and permanent injury. In preparation for trial, the defence obtained over 130 hours of surveillance footage, but failed to produce an affidavit of documents and failed to disclose the surveillance before the trial commenced. At trial, during the cross-examination of the plaintiff, to the surprise of the plaintiff and his counsel, the defence introduced 27 minutes of surveillance footage. Although plaintiff counsel objected to its admissibility, the trial judge admitted the edited footage, on the basis that the evidence was to be used for impeachment.

On appeal, it was held that the trial judge, by admitting the surveillance evidence, had permitted a “trial by ambush.” Specifically, the trial judge erred by failing to require the defendants to comply with the *Rules of Civil Procedure*² in relation to the disclosure of the surveillance and the provision of particulars. The defendant was not made to comply with the *Browne v. Dunn*³ rule and provide the grounds for impeachment. Finally, the trial judge permitted the evidence to be used for substantive purposes and did not properly instruct the jury on the impeachment limitations.

Parties have a continuous obligation of disclosure. Under Rule 30.03(2)(b), surveillance evidence is typically identified in Schedule B of an affidavit of documents, which permits the opposing

¹ *Iannarella v. Corbett*, 2015 ONCA 110, (“*Iannarella*”).

² *Rules of Civil Procedure*, RRO 1990, Reg 194 (“the *Rules*”).

³ *Browne v. Dunn*, (1983) 6 R 67, HL (“*Browne v. Dunn*”).

party the opportunity to seek full particulars at examination for discovery. The particulars of the surveillance must include the date, time, and location of the surveillance, as well as the nature and duration of the activities depicted and the names and addresses of the videographers. A combination of Rules 30.06 and 30.07(b) oblige parties to provide an updated affidavit of documents listing new surveillance obtained, and the particulars of the subsequent surveillance must be disclosed pursuant to Rule 31.09(1)(b) upon request. The right to further discovery on the subsequent disclosed surveillance is provided in Rule 48.04(2). Under Rule 30.09, a party can use surveillance as substantive evidence only if privilege has waived and it has been properly disclosed, but is limited to using it for impeachment purposes if the claim of privilege is maintained.⁴ If a party has not complied with the disclosure requirements, the party may only use the evidence with leave. However, under Rule 53.08, a trial judge “must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs.”⁵

At the heart of the Court of Appeal’s critique regarding the improper admission of undisclosed surveillance evidence is “the interests of fairness and the objective of efficiency and settlement.”⁶ The Court of Appeal highlighted that disclosure of evidence is promoted in order to encourage early settlement and reduce court costs⁷ and “to assist the plaintiff in evaluating the strength of her case and arriving at her settlement position prior to trial.”⁸ The obligation to update discovery answers, and thereby provide the particulars of surveillance as it is obtained, is to discourage a “trial by ambush” and to promote “the objects of discovery which include the encouragement of settlement, the narrowing of issues, and the basic rule of fairness that a party should have reasonable knowledge of the case he must meet.”⁹

In *Iannarella*, the trial judge erred by not requiring the defendant to produce an affidavit of documents, regardless of the plaintiff waiving his rights to discovery. The trial judge then erred by admitting the surveillance evidence, even with the exception provided in Rule 53.08. The Court of Appeal held that the prejudice was “baked in” to the trial because of the stage of trial in which the

⁴ *Landolfi v. Fargoine*, [2006] OJ No 1226.

⁵ *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, [2002] OJ No 4428.

⁶ *Iannarella*, at para 46.

⁷ *Beland v. Hill*, 2012 ONSC 4955, at para 50.

⁸ *Armstrong v Burke*, 2013 ONSC 4353, at para 11.

⁹ *Burke v. Gauthier*, [1987] OJ No 1086.

evidence was revealed. Had the plaintiff been made aware of the evidence prior to trial, the plaintiff may have responded to settlement differently, or at the very least the plaintiff's counsel may have prepared him differently for cross-examination. Finally, the trial judge should have been satisfied that the defence had laid an adequate factual foundation that the surveillance would be used for impeachment following the *Browne v. Dunn* rule. The jury was not properly instructed to limit the use of the surveillance evidence for the purposes of impeachment of credibility. Instead, the defence was permitted to make substantive use of the surveillance evidence. For all of these reasons, a new trial on damages was ordered and proper disclosure of surveillance was required.

Pre-Trial Disclosure of Evidence Post-*Iannarella*:

The *Iannarella* decision has been cited in a variety of ways in recent cases with respect to the pre-trial disclosure of evidence. In *Hallock v. Hothi*, where the plaintiff was already made aware of surveillance evidence but where the surveillance was not listed in an affidavit of documents, the Ontario Superior Court on a motion ordered that the defendants deliver a sworn supplementary affidavit of documents including the surveillance in order for the continuation of further examinations for discovery.¹⁰

In *Bishop-Gittens v. Lim*, the defendant did not disclose surveillance evidence until shortly before trial, and the particulars of the surveillance were provided but not a copy of the footage. The plaintiff brought a pre-trial motion to exclude the use of surveillance evidence for the purposes of impeachment, as the defendant was not purporting to use the evidence substantively, on the basis that the defendant had not complied with the *Rules* and had failed to produce a supplementary affidavit of documents. Nonetheless, while the defendant was in breach of the obligations to produce an updated affidavit, the Court held that leave should be granted under Rule 53.08, as the prejudicial effect on the plaintiff had not been "baked in", as the trial had not yet commenced.¹¹ The Court ordered that if the plaintiff requested an adjournment of the trial, the adjournment would be granted and the defendant would be ordered to pay the plaintiff's costs thrown away. Additionally, the court ordered that the defence shall forthwith provide to the plaintiff copies of the surveillance of the plaintiff's activities.

¹⁰ *Hallock v. Hothi*, [2015] OJ No 5896, at para 3.

¹¹ *Bishop-Gittens v. Lim*, [2015] OJ No 2861, at para 17.

In *Vickers v. Palacios*, the defence sought to have surveillance evidence tendered as both substantive evidence and for impeachment via a *voir dire*.¹² Here, the plaintiff had the opportunity to view the video evidence in preparation for trial, but only shortly before trial. The Court held that, pursuant to *Iannarella*, in the balancing of probative value with prejudicial effect, the failure of the defendants to comply with the *Rules* and the very late disclosure of the evidence excluded the surveillance for all purposes.

Most recently, in *Nemchin v. Green*, the Court stressed the function of the trial judge as a gatekeeper of surveillance evidence. Ultimately, the Court held that surveillance evidence could not be admitted because the particulars provided were inadequate and the defence had only provided edited footage. Pursuant to the gatekeeper role, the Court was not satisfied that the evidence was a fair and accurate depiction, and the editing was found to be biased. Additionally, some of the subjective descriptions were misleading. Having found that no step of the three-part gatekeeping test was met, it was not necessary to weigh the probative value of the evidence against the potential prejudice to the plaintiff. However, the court held that there was minimal probative value and it therefore would have been inadmissible in any event.¹³

Iannarella has also been used in the context of Small Claims Court, in a file where a party failed to disclose documents to be relied on at trial at least 14 days prior to the date of a settlement conference, as required by the Small Claims Court rules. The Divisional Court ordered that the judgement of a Small Claims Court sitting be set aside and ordered a new trial.¹⁴ The Court asserted that a trial by ambush was not permitted, regardless of the court.

As the recent case law suggests, the courts have continued to use *Iannarella* to promote the proper disclosure of evidence to prevent a trial by ambush. If a party wishes to use surveillance evidence as substantive evidence or for impeachment purposes, but has not readily and regularly disclosed the particulars of the evidence and provided copies of the evidence, the party should be prepared to be challenged by the courts.

¹² *Vickers v. Palacios*, [2015] OJ No 7244.

¹³ *Nemchin v. Green*, [2017] OJ No 1444.

¹⁴ *Montgomery Fleet Services Inc. v. Corlies*, [2016] OJ No 922.