

proof on a balance of probabilities. It is submitted that the same standard of proof as would be required under the Act should be applied and, that being the case, it perhaps makes little difference whether the "inquiry" is conducted specifically pursuant to the Act or not.

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### PRODUCTION OF DOCUMENTS HELD BY AFFILIATED CORPORATIONS UNDER RULE 30.02(4): SOME PROBLEMS†

Rule 30.02(4) of the Rules of Civil Procedure<sup>1</sup> provides that a court may order the disclosure and production of relevant documents held by a party's affiliated or subsidiary corporation, or by a corporation controlled by that party. However, it will be submitted in this article that use of the rule to secure an order for production (as opposed to disclosure alone) of such documents involves a number of pitfalls, chief among them being onerous notice requirements and the risk that the order will in fact be ineffective to secure the documents. Indeed, it is arguable that disclosure and production of documents held by affiliated or controlled corporations will in fact require a two-step procedure: first, a motion under rule 30.02(4) for disclosure alone; second, a motion under rule 30.10 for production of the documents disclosed that are held by the non-party corporation.

Rule 30.02(4) provides as follows:

The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged.

A corporation is a subsidiary of another corporation where it is controlled, directly or indirectly, by the other corporation.<sup>2</sup> A corporation is affiliated with another corporation where either is the subsidiary of the other; or where both are subsidiaries of the same corporation, or are controlled, directly or indirectly, by the same person or group or persons.<sup>3</sup> For the purposes of this article

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† In writing this article, I have profited from my discussions with Diana Forrest of Timothy Fellowes and Associates, and Judith Harris of Osler, Hoskins, Harcourt, Toronto.

<sup>1</sup> O. Reg. 560/84.

<sup>2</sup> Rule 30.01(2)(a).

<sup>3</sup> Rule 30.01(2)(b).

it is important to note that all members of a corporate family — parent, child and sibling — are affiliated with each other, provided their kinship is based on control.

Control, and how it is to be established for the purposes of the rules, is not defined. One may assume, however, that, at the least, a person who controls, directly or indirectly, 51% of the corporation's voting shares can be said to control that corporation.<sup>4</sup>

In effect, rule 30.02(4) provides for a court-ordered expansion of the duty of disclosure, which, in general, is limited by the requirement that the documents be (or have been) in the party's possession, control or power.<sup>5</sup> It is true that "power" is defined to include an entitlement to obtain a document held by another if the party seeking disclosure is not so entitled.<sup>6</sup> Thus, for example, a party who is a shareholder of a corporation is required, where appropriate,<sup>7</sup> to disclose (and produce) the financial statements of that corporation to which he is entitled under the *Business Corporations Act, 1982*.<sup>8</sup> Absent such entitlement, however, the party is not required to disclose the existence of documents, even though they may be relevant, held by a non-party corporation of which he has knowledge in virtue of his being a majority shareholder. Those documents are in the corporation's possession, control or power, not his. He may be required to disclose those documents only by an order under rule 30.02(4).

There are a number of problematic areas that arise where a party chooses to move *for production* under rule 30.02(4). First, there is the question of notice. The rule contains no express provision for notice to the non-party affiliated or controlled corporation as, for example, with rule 30.10. On the other hand, rule 37.07(1) provides that notice of a motion "shall be served on any person or party *affected* by the order sought" (emphasis added). The non-party corporation is clearly a person affected by the order. The documents whose production is sought may be confidential, sensitive or privileged. Notice to the non-party corporation is thus required in a motion under rule 30.02(4).

It is also arguable that notice should be served on all the

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<sup>4</sup> *Quaere*, whether the same cannot be said of an experienced businesswoman involved in a company wholly owned by her inexperienced and uninvolved husband.

<sup>5</sup> As set out in rule 30.02(1).

<sup>6</sup> Rule 30.01(1)(b).

<sup>7</sup> That is, where the documents relate to any matter in issue: rule 30.02(1).

<sup>8</sup> S.O. 1982, c. 4, ss. 153 and 156.

minority shareholders as well.<sup>9</sup> This possibility becomes clearer on an analysis of the second area of concern.

The court's power to order production under rule 30.02(4) is limited to parties. Where the party against whom an order for production is sought is a parent corporation or a controlling individual, the rule obviously contemplates that the party will exercise its control as a shareholder over the non-party corporation to request its officers or directors to deliver the required documents. Given that the order does not bind the corporation, a minority shareholder might argue that for a majority shareholder to exercise his power over the corporation to cause it to produce documents of the corporation in an action in which it is not a party is a form of oppression under the *Business Corporations Act, 1982*.<sup>10</sup> Of course, it may be that the fact that the majority shareholder acts pursuant to a court order might be sufficient to vitiate any finding of oppression that might otherwise be made. But the possibility of such a finding may be enough, it is submitted, to bring the minority shareholder under the notice provisions of rule 37.07(1).

There is another more substantive difficulty. The party subject to the order in the above example exercises his control over the corporation as a shareholder by virtue of his power to elect a majority of the board of directors; however, the actual day-to-day control of the company is exercised by the board and by the corporate officers and they are under no legal obligation to comply with the majority shareholder's request that they cause the corporation to deliver the documents to him. Indeed, these individuals, though they may ultimately owe their positions to the majority shareholder, all owe a statutory duty to the corporation to act with a view to its best interests.<sup>11</sup> They would be in breach of that duty if they were to comply with the majority shareholder's request in circumstances where to do so would not be in the corporation's best interests. This would be so notwithstanding that the request was made pursuant to a court order. The directors and officers would thus be well within their rights — indeed, might even be under a duty — to refuse to comply with the request. (It

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<sup>9</sup> The majority shareholder, being the party served under rule 30.02(4), will already have notice.

<sup>10</sup> *Supra*, footnote 8, s. 247(2).

<sup>11</sup> *Business Corporations Act, 1982, supra*, footnote 8, s. 134.

should be noted that the existence of such a duty, and the possibility of its breach if the request is acceded to, further feeds the right of the minority shareholder to notice of a motion under rule 30.02(4).)

So far we have considered the case where the party against whom a rule 30.02(4) order is made is a controlling shareholder. But the rule also includes parties who are controlled corporations.<sup>12</sup> And where an order is made against a controlled corporation, its ability to comply with it will depend on the willingness of its non-party parent (or sister, in the case of affiliated corporations) to deliver up the documents. Where, for whatever reasons, the parent or sister corporation refuses to deliver the documents, the party against whom the order has been made will be unable to comply with it.

The effect of the above discussion is to suggest that, while a rule 30.02(4) order may be sufficient to secure disclosure of relevant documents, it may not be effective to secure their production. The party seeking production may, however, take some comfort in rules 30.08(1) and (2), which provide severe penalties for failure to comply with a court order for production. If the documents disclosed under rule 30.02(4) are vital to his case, he may also move against the non-party corporation for an order for production under rule 30.10.

The party subject to a rule 30.02(4) order is not without a remedy either. Rule 30.10(1) may be invoked against a non-party where "it would be unfair to require the moving party to proceed to trial without having discovery of the document". It is submitted that the risk the party runs of being penalized under rules 30.08(1) and (2) for failure to comply with the rule 30.02(4) order gives it status to move under rule 30.10(1) to compel its affiliated corporation (parent, sister or child) to produce the necessary documents.

The ease with which a rule 30.02(4) order for production may be frustrated, together with the onerous notice requirements that arise when such an order is sought, suggest that a party is better advised to seek *only disclosure* under the rule. A motion under rule 30.02(4) for disclosure alone would arguably avoid the need for notice to minority shareholders and, indeed, to the affiliated or

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<sup>12</sup> It also includes sister corporations that fall within the definition of affiliated corporations provided by rule 30.01(2)(b)(ii).

controlled corporation: disclosure of the existence of documents, as opposed to their contents, would be unlikely to prejudice the interests of either. Hence there would be no need under rule 37.07(1) to serve either with notice of the rule 30.02(4) motion.

If the party who obtains disclosure then moves for production under rule 30.10(1), he will be required to serve only the non-party corporation in possession of the documents, as provided by rule 30.10(2). Notice to any minority shareholders would not be necessary inasmuch as compliance with the order which binds the corporation would give rise to no issues of oppression, or breach of duty on the part of the directors or officers.

It might be argued that to require a party to seek production under rule 30.10, rather than rule 30.02(4), is to deprive it of the benefit of a lower test of relevance that is arguably present in the latter. For it has been suggested by a number of commentators that rule 30.10 establishes, as a pre-condition to production, a higher test or degree of relevancy than that present under the general duty of disclosure and production found under rule 30.02.<sup>13</sup> It is submitted, however, that while the general duty in rule 30.02 may be lower than that in rule 30.10(1), the test in rule 30.02(4) is arguably the same as that in rule 30.10(1).

Rule 30.02 provides that a party shall disclose and produce "every document relating to any matter in issue in an action".<sup>14</sup> Rule 30.02(4) permits a court to order a party to disclose and produce "all relevant documents". And rule 30.10(1) permits a court to order the production of a document "relevant to a material issue in the action".<sup>15</sup> If rule 30.10(1) does impose a higher test, it is not in virtue of its use of the words "material issue", as opposed to the words "any matter in issue" that are used in rule 30.02. A material issue is surely a matter in issue between the parties: it can be no higher than that.<sup>16</sup> Indeed, given the onus on the defendant (and on the plaintiff in reply) to admit in his pleadings all facts not in dispute, and to plead versions of the facts

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<sup>13</sup> See, for example, Bar Admission Course, 1984-85, Materials on Civil Procedure I, p. 322; Morden, "An Overview of the Rules of Civil Procedure", L.S.U.C., 18 *Gazette*, (1984) p. 153.

<sup>14</sup> As provided in subrules (1) and (2).

<sup>15</sup> Rule 30.10(1)(a); it must also be unfair to require the moving party to go to trial without discovery of the document: rule 30.10(1)(b).

<sup>16</sup> *McCormick's Handbook of the Law of Evidence*, 2nd ed. (St. Paul, West Pub. Co., 1972), pp. 433-35.

different from those pleaded by the plaintiff,<sup>17</sup> it is unlikely that any matter in issue between the parties would be anything other than material.

The higher standard, if it does exist, must arise instead with the use of the word "relevant" in rule 30.10(1), as opposed to "relating" in rule 30.02. On most dictionary definitions of the two words,<sup>18</sup> the former requires a higher degree of pertinence or a closer connection between the document and the issues than does the latter.

The above analysis returns us to rule 30.02(4). It refers simply to "relevant documents". If the difference between the tests imposed by rules 30.02 and 30.10(1) does indeed revolve around the use of the word "relevant" in the latter, then one is bound to conclude that the higher test imposed by rule 30.10(1) is also applicable to rule 30.02(4). Thus it can be said that a party who chooses to move under rule 30.10(1) instead of rule 30.02(4) suffers no real prejudice, at least with respect to the test of relevance he has to meet.<sup>19</sup>

In conclusion, then, it may be said that where one seeks disclosure and, ultimately, production of documents in the possession, control or power of a non-party corporation that is affiliated to or controlled by a party, one is better advised to move for disclosure alone under rule 30.02(4), notwithstanding its more expansive wording. One may then use the information obtained to ground a motion under rule 30.10(1) for an order against the non-party corporation requiring it to produce the needed documents. If one, instead, tries to combine both motions within rule 30.02(4), as one is encouraged to do by the wording of the rule itself, one risks having to comply with notice requirements that are more onerous than those found in rule 30.10 and risks obtaining an order for production that is in fact ineffective to secure the documents sought.

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<sup>17</sup> As provided by rules 25.07 and 25.08.

<sup>18</sup> See, for example, the definitions in the Shorter Oxford English Dictionary, 3rd edition.

<sup>19</sup> And as to the second branch of the test in rule 30.10(1), that it be unfair to require the moving party to go to trial without discovery of the document, one might argue, where the non-party is an affiliated or controlled corporation, that the inability of rule 30.02(4) to deliver what the party is otherwise promised on its wording — production of relevant documents — is an unfairness within the rule.

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