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1991 CarswellAlta 37
Alberta Court of Queen's Bench
Kiedynk v. John Doe
1991 CarswellAlta 37, [1991] A.W.L.D. 214, 116 A.R. 313, 25 A.C.W.S. (3d) 428, 79 Alta. L.R. (2d) 72

KIEDYNK v. DOE et al.

Virtue J.
Judgment: February 7, 1991
Docket: Calgary Doc. 8901-16407

Counsel: *F. Zinkhoffer*, for plaintiff.
S.R. MacMillan, for defendants.
G.C. Hawco, Q.C., for Calgary District Hospital Group Foundation Ltd.
Subject: Public; Civil Practice and Procedure

Headnote

Health Law --- Hospitals — Access to hospital records
Practice --- Discovery — Discovery of documents — Privileged document — Hospital records and medical reports
Civil procedure — Discovery — Discovery of documents — Documents relating to case of party — Section 40(3) of Hospitals Act prohibiting hospital from producing hospital admitting records identifying patients by name — Section 40(3) taking priority over R. 209.
Medicine and health disciplines — Hospitals — Administration — Medical records — Access to records — Section 40(3) of Hospitals Act protecting "information from hospital records" — Patients' identities forming part of records — Hospitals prohibited from producing hospital admitting records identifying patients by name.
The plaintiff applied for an order under R. 209 compelling a hospital to disclose the names of patients who were admitted to the emergency department on a particular date and who satisfied a certain description. The application was dismissed and the plaintiff appealed.
Held:
Appeal dismissed.
Section 40(3) of the Hospitals Act protects "information from hospital records." The patient's name forms part of those records. Hospital admitting records identifying patients by name therefore constitute information which the hospital is prohibited from producing.
Rule 209 is a general rule only, and must give way to the particular provisions of s. 40 of the Hospitals Act.

Table of Authorities

Cases considered:
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17 (Q.B.) — *referred to*
Lindsay v. M. (D.), [1981] 3 W.W.R. 703, 121 D.L.R. (3d) 261, 26 A.R. 159 (C.A.) — *applied*
Unger v. Sun Alliance & London Assur. Co., [1978] 4 W.W.R. 759, 88 D.L.R. (3d) 502, 11 A.R. 404 (T.D.)*applied*
Statutes considered:
Hospitals Act, R.S.A. 1980, c. H-11
s. 40(1), (3) [both am. 1985, c. 26, s. 7], (11)
Rules considered:
Alberta Rules of Court
R. 209
Regulations considered:
Hospitals Act, R.S.A. 1980, c. H-11 — Operation of Approved Hospitals Regulations, Alta. Reg. 146/71 —
s. 12

Appeal from dismissal of application for order compelling hospital to produce admitting records.

Virtue J.:

1 This is an appeal from a master who declined to order the Holy Cross Hospital to produce its records so as to disclose to the plaintiff the names of those patients admitted to the hospital's emergency department between 11:00 p.m. on 23rd July 1989 and 2:00 a.m. on 24th July 1989 who satisfied the following description:

2 a) adult male;

3 b) lacerations to his face with blood on his shirt;

4 c) clear evidence of intoxication;

5 d) complained of being thrown down the stairs by bouncers at Bronco Billy's Restaurant and Bar;

6 e) who was delivered to the emergency department by taxi.

7 The plaintiff sought the information in an effort to find the name of a person said to have been a witness to an alleged assault upon the plaintiff by an employee of the defendant, Bronco Billy's.

8 The plaintiff relies upon R. 209(1) of the Alberta Rules of Court:

> 209. (1) When a document is on possession of a third person not a party to the action and it is alleged that any party has reason to believe that the document relates to the matters in issue, and the person in whose possession it is might be compelled to produce it at the trial, the court may on the application of any party direct the production of the document at such time and place as the court directs and give directions respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions.

9 The hospital refused to produce its records on the basis that:

10 a) the required records are not compellable under R. 209;

11 b) the hospital is prohibited from producing the records under s. 40 of the Hospitals Act, R.S.A. 1980, c. H-11.

12 Master Floyd denied the plaintiff's application and I agree with his decision.

13 Section 40(3) of the Hospitals Act states:

> (3) Information obtained from hospital records or from persons having access thereto shall be treated as private and confidential information in respect of any individual patient and shall be used solely for the purposes described in subsection (2) and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interests, reputation or privacy of a patient or the patient's attending physician or any other person providing diagnostic or treatment services to a patient.

14 Substantial fines are provided for a breach of the subsection. There are a number of exceptions, none of which have application in the case at bar.

15 Kerans J.A. considered the purpose of similar legislation in *Lindsay v. M. (D.)*, [1981] 3 W.W.R. 703, 121 D.L.R (3d) 261, 26 A.R. 159 (C.A.), and concluded at p. 709:

> For further insight as to the applicable criteria, one must again resort to the purpose of the legislation. In my view, its first purpose was to protect the privacy of the patient. Therefore, the court should be vigilant, and demand compelling grounds before permitting access to medical records.

16 I agree with Justice Kerans' definition of the primary purpose of the legislation and his characterization of the standard of vigilance to be exercised by the courts before breaching a patient's privacy.

17 The plaintiff advanced the proposition that the hospital's admission records (which would disclose the name of persons admitted to hospital) did not come within the protection of s. 40(3). He relied upon s. 40(1) which provides:

> 40(1) The board of each approved hospital shall cause to be kept by the attending physician or any other person

> providing diagnostic or treatment services to a patient a record of the diagnostic and treatment services provided in respect of each patient in order to assist in providing a high standard of medical care.

18 The plaintiff submits that only the record of diagnostic or treatment services is protected by the Act. I do not believe this interpretation takes into account the difference in wording between s. 40(1) and (3). What is protected by subs. (3) is "information ... from hospital records," a term which is broader than "a record of the diagnostic and treatment services," the term used in s. 40(1). A record of diagnostic or treatment services is part of — but does not comprise the whole of — the term "hospital records."

19 Support for this view is found in s. 12 of the Operation of Approved Hospitals Regulations (which applies to the Holy Cross Hospital, and is Alta. Reg. 146/71), which requires the hospital board to keep a record for each admission which shall "identify the patient." The patient's identity is thereby made a part of the hospital's records which are protected by s. 40(3). I conclude, therefore, that hospital records, identifying by name persons admitted to hospital, constitute information which the hospital is prohibited from producing.

20 Insofar as R. 209 is concerned, Steer J. in *Unger v. Sun Alliance & London Assur. Co.*, [1978] 4 W.W.R. 759, 88 D.L.R. (3d) 502, 11 A.R. 404 (T.D.), after concluding that there was, under the Hospitals Act, "an absolute prohibition against production of the documents," said at p. 766:

> This being the position, it is my opinion that R. 209(1) does not authorize the court to make an order on behalf of the defendant directly against the board directing it or someone on its behalf to attend and produce the documents. Rule 209(1), albeit it has the effect of a statute, is a general rule only and must give way to the particular provisions of s. 35 [now s. 40].

21 I adopt this as a correct statement of the law in Alberta and accordingly it is not necessary for me to deal with the defendant's submissions that, altogether apart from the prohibition contained in the Hospitals Act, this is not a proper case for the application of R. 209(1). Had it been necessary for me to do so I would have been concerned that a demand to produce the names of all persons admitted to hospital meeting certain criteria, might very well be characterized as a "fishing expedition," as to which, see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17 (Q.B.).

22 The plaintiff advanced a further submission based upon s. 40(11) of the Hospitals Act. I do not believe that s. 40(11) affords any assistance to the plaintiff as it is limited to applications for information by a patient or the patient's legal representative, which is not the case here.

23 The appeal is dismissed with costs to the defendant, no limiting rule to apply, including all proper disbursements.

Appeal dismissed.

Tab B-19

2008 SCC 8
Supreme Court of Canada
Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.
2008 CarswellBC 411, 2008 CarswellBC 412, 2008 SCC 8, [2008] 1 S.C.R. 157, [2008] 4 W.W.R. 1, [2008] B.C.W.L.D. 1749, [2008] B.C.W.L.D. 1750, [2008] B.C.W.L.D. 1767, [2008] S.C.J. No. 8, 164 A.C.W.S. (3d) 765, 252 B.C.A.C. 1, 290 D.L.R. (4th) 193, 372 N.R. 95, 422 W.A.C. 1, 50 C.P.C. (6th) 207, 75 B.C.L.R. (4th) 1, J.E. 2008-501

Suzette F. Juman also known as Suzette McKenzie (Appellant) v. Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram, Chief Constable of the Vancouver Police Department, Attorney General of Canada and Attorney General of British Columbia (Respondents)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.
Heard: November 15, 2007
Judgment: March 6, 2008
Docket: 31590

Proceedings: reversing *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2006), 55 B.C.L.R. (4th) 66, [2006] 9 W.W.R. 687, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 227 B.C.A.C. 140, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 374 W.A.C. 140, 2006 BCCA 262, 2006 CarswellBC 1275, 31 C.P.C. (6th) 149, 269 D.L.R. (4th) 654 (B.C. C.A.); reversed in part *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2005), 2005 CarswellBC 621, 45 B.C.L.R. (4th) 108, 2005 BCSC 400, [2005] 11 W.W.R. 539, 15 C.P.C. (6th) 211, 129 C.R.R. (2d) 109 (B.C. S.C.)

Counsel: Brian T. Ross, Karen L. Weslowski for Appellant
No one for Respondent, Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram
Karen F.W. Liang for Respondent, Chief Constable of the Vancouver Police Department
Michael H. Morris for Respondent, Attorney General of Canada
J. Edward Gouge, Q.C., Natalie Hepburn Barnes for Respondent, Attorney General of British Columbia
Subject: Civil Practice and Procedure; Constitutional

Headnote

Civil practice and procedure --- Discovery — Introductory — Deemed or implied undertaking
Parents brought action for damages against owners and operators of daycare after child sustained brain injury, claiming that daycare employee caused or contributed to injury — Concurrent to civil action, police conducted investigation into child's injury, but had not laid charges — Employee brought motion to prevent release of information from transcripts of discovery to police or Attorney General ("AG"), based on implied undertaking rule — AG brought motions to vary implied undertaking so as to allow disclosure to police or AG for investigation and/or prosecution, or to allow for search warrants and subpoenas to obtain transcripts — Chambers judge made declaration that AG and police were under obligation not to cause parties or their solicitors to violate undertaking in respect of proposed examination for discovery of employee without her consent or further order of court, and motions were otherwise dismissed — AG's appeal was allowed in part — Declaration was set aside, and appeal court held that implied undertaking did not preclude party to civil proceedings from disclosing discovery evidence to police in good faith for purpose of assisting police in criminal investigation — Employee appealed — Appeal allowed — Implied undertaking rule served to encourage complete disclosure while protecting examinee from having answers and documents used for purpose collateral or ulterior to proceedings in which they were demanded — Where examinee did not consent to disclosure, party bound by undertaking, or in special circumstances third party, could apply to court for leave to use information or documents, and application to modify or vary implied undertaking required applicant to show that public interest was of greater weight than privacy of examinee and efficient conduct of civil litigation — Courts had generally not favoured attempts to use discovered material for extraneous purposes in absence of compelling public interest — Exceptional circumstances where undertaking could be set aside included statutory exceptions, public safety concerns, and impeachment of inconsistent testimony — Implied undertaking continued to bind parties after settlement or trial — While AG had standing to seek variation of implied undertaking to which he was not party, application was rejected on facts.
Procédure civile --- Interrogatoire au préalable — Introduction — Engagement présumé ou implicite
Parents d'un enfant ayant subi un traumatisme crânien ont intenté une action en dommages-intérêts contre les

propriétaires-exploitants de la garderie, alléguant qu'une travailleuse en garderie avait causé ou contribué au traumatisme — Parallèlement à la poursuite civile, la police a mené une enquête sur le traumatisme qu'a subi l'enfant mais aucune accusation criminelle n'a été portée — Travailleuse a présenté une requête visant à interdire la communication des renseignements provenant des transcriptions de l'interrogatoire préalable à la police ou au procureur général (« PC »), en se fondant sur la règle de l'engagement implicite — PC a présenté des requêtes en vue de faire modifier l'engagement de manière à permettre la communication des transcriptions à la police ou au PC pour enquête et poursuite, le cas échéant, ou pour que soit rendue une ordonnance autorisant la police à demander les transcriptions par voie de mandat de perquisition ou de subpoena — Le juge en chambre a déclaré que le PC et la police étaient tenus de ne pas faire en sorte que les parties ou leurs avocats aient à violer l'engagement pris à l'égard de l'interogatoire au préalable de la travailleuse sans le consentement de cette dernière ou sans une ordonnance de la cour à cet effet et a rejeté les requêtes — Appel interjeté par le PC a été accueilli en partie — Déclaration a été annulée et la Cour d'appel a statué que l'engagement implicite n'empêchait pas les parties à un litige civil étaient libres de divulguer, de bonne foi, à la police les éléments de preuve obtenus lors de l'interrogatoire préalable pour aider la police dans le déroulement de leur enquête criminelle — Travailleuse a formé un pourvoi — Pourvoi accueilli — Utilité de l'engagement implicite était d'encourager la divulgation complète de renseignements tout en protégeant les réponses et les documents fournis par la personne interrogée contre leur utilisation à des fins connexes ou ultérieures à l'instance où ils sont exigés — Dans le cas où la personne interrogée ne consentait pas à la divulgation, une partie liée par l'engagement, et exceptionnellement des tiers, pouvait demander à la cour l'autorisation d'utiliser les renseignements ou les documents et la requête pour faire modifier l'engagement implicite exigeait du requérant qu'il démontre que l'intérêt public l'emportait sur la protection de la vie privée de la personne interrogée et le déroulement efficace du litige civil — En l'absence d'intérêt public impératif, les tribunaux n'ont généralement pas favorisé les tentatives d'utiliser la preuve recueillie au cours d'un interrogatoire préalable à des fins étrangères à l'instance — Exceptions légales, la sécurité publique et la mise en cause de la crédibilité d'un témoignage contradictoire, entre autres, constituaient des circonstances exceptionnelles où un engagement pouvait être annulé — Une fois l'affaire réglée ou le procès terminé, les parties demeureaient tenues de respecter l'engagement implicite — Bien que le PC ait démontré un intérêt suffisant pour présenter une demande de modification de l'engagement implicite auquel il n'était pas lié, la requête a été rejeté sur la base des faits de la cause.

In 2001, a 16-month-old child suffered a seizure while in the care of a daycare employee. The child was later determined to have suffered a brain injury, and she and her parents sued the owners and operators of the daycare for damages, alleging that the injury resulted from the employee's negligence. Concurrent to the civil action, police conducted an investigation into the child's injury, but no charges had been laid. In November 2004, the employee brought motions to prevent the release of the information from the transcripts from her discovery to the Attorney General of British Columbia or the police, relying on the implied undertaking rule. The Attorney General opposed the employee's motions and brought a cross-motion for an order varying the undertaking to permit the release of the transcripts to the police, or for an order permitting the police to apply for the transcripts by way of search warrant or subpoena. The employee was examined over four days, and the transcripts remained in the possession of the parties and their counsel. In 2006, the claim was settled and the employee's discovery was never entered into evidence at a trial, nor its contents disclosed in open court.

The chambers judge rejected the argument that the implied undertaking did not apply to evidence of crimes, since evidence of crimes could range from mere suspicion to blatant admissions. The chambers judge held that it was better to leave the discretionary power of relief to the courts, rather than the parties. The Court of Appeal allowed the Attorney General's appeal, holding that the undertaking could not "form a shield from the detection and prosecution of crimes in which the public has an overriding interest." The court also held that discovery material was not immune to search or seizure. The employee appealed.

Held: The appeal was allowed.

The implied undertaking existed to statutorily compel full participation in pre-trial oral and documentary discovery. The public interest in obtaining the truth in a civil action outweighed the examinee's privacy interest, but such interest was entitled to some protection, namely, that the documents and answers provided would not be used for a purpose collateral or ulterior to the proceedings in which they were demanded. This was to encourage more complete and candid discovery. Exceptional circumstances could warrant variation or modification of the undertaking where the party did not consent to the use of the information other than in the proceeding where it was demanded. On an application to modify or vary an implied undertaking, the applicant was required to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values the undertaking was designed to protect. The exceptional circumstances included statutory exceptions, public safety concerns, and the impeachment of inconsistent testimony. The problem with

the "crimes" exception as suggested by the Court of Appeal was that parties to a civil action were not in the best position to determine whether a crime had been committed, and this was best left to a court to decide. The good faith requirement suggested by the Court of Appeal was not consistent with the court's rationale for granting relief against the undertaking.
In this case, the matter was settled in 2006, and, as a result, the employee was not required to give evidence at trial, nor were her examination for discovery transcripts read into evidence. However, the implied undertaking continued to bind the parties, since the answers and documents had not become part of the court record.
The Attorney General demonstrated a sufficient interest in the employee's transcripts to be given standing to apply for variation or modification of the implied undertaking in this case. However, the Attorney General and the police could not be permitted to take advantage of statutorily compelled testimony in a civil action to undermine the employee's right to silence and the protection against self-incrimination afforded by the Canadian Charter of Rights and Freedoms.

En 2001, une enfant de 16 mois a eu une crise d'apoplexie pendant qu'elle était sous la garde d'une travailleuse en garderie. Il a été déterminé par la suite que l'enfant avait subi une lésion cérébrale et ses parents et elle ont intenté une action en dommages-intérêts contre les propriétaires-exploitants de la garderie, alléguant que la lésion était imputable à une négligence de la part de la travailleuse en garderie. Parallèlement à la poursuite civile, la police a mené une enquête sur le traumatisme qu'a subi l'enfant mais aucune accusation criminelle n'a été portée. En novembre 2004, la travailleuse en garderie a présenté des requêtes visant à interdire la communication des renseignements provenant des transcriptions de l'interrogatoire préalable à la police ou au procureur général de la Colombie-Britannique, en se fondant sur la règle de l'engagement implicite. Le procureur général de la Colombie-Britannique s'est opposé aux requêtes de l'appelante et a présenté une requête incidente en vue de faire modifier l'engagement de manière à permettre la communication des transcriptions à la police ou pour que soit rendue une ordonnance autorisant la police à demander les transcriptions par voie de mandat de perquisition ou de subpoena. L'interrogatoire préalable de la travailleuse en garderie a duré quatre jours et les transcriptions sont demeurées en la possession des parties ou de leurs avocats. En 2006, la demande a fait l'objet d'un règlement et l'interrogatoire préalable de la travailleuse en garderie n'a jamais été déposé en preuve devant les tribunaux et les renseignements obtenus au cours de cet interrogatoire n'ont pas été divulgués en audience.
Le juge en chambre a rejeté l'argument que l'engagement implicite ne visait pas la preuve de crimes, puisqu'une telle preuve pouvait aller du simple soupçon à l'aveu flagrant. Le juge en chambre a conclu qu'il valait mieux laisser aux tribunaux, plutôt qu'aux parties, le pouvoir discrétionnaire de modifier l'engagement. La Cour d'appel a accueilli l'appel interjeté par le procureur général, statuant que l'engagement « ne peut protéger contre la détection du crime et la poursuite des criminels, domaines où l'intérêt du public est prédominant ». La Cour a également statué que les éléments de preuve obtenus à l'enquête préalable ne sont pas à l'abri d'une fouille, d'une perquisition et d'une saisie. La travailleuse en garderie a formé un pourvoi.
Arrêt: Le pourvoi a été accueilli.
L'engagement implicite reposait sur l'obligation légale de participer pleinement à l'interrogatoire préalable et à la communication préalable de documents. Dans une action civile, l'intérêt du public à découvrir la vérité l'emportait sur le droit de la personne interrogée à sa vie privée, lequel méritait néanmoins une certaine protection, à savoir que les documents et les réponses qu'elle a fournis ne seront pas utilisés à des fins connexes ou ultérieures à l'instance où ils sont exigés. Cela avait pour but d'inciter cette personne à donner des renseignements plus exhaustifs et honnêtes. Des circonstances exceptionnelles pouvaient garantir la modification de l'engagement lorsque la partie ne consentait pas à ce que les renseignements soient utilisés à d'autres fins que celles du procès où ils avaient été demandés. La personne qui demande une modification ou une levée de l'engagement implicite doit démontrer au tribunal, selon la prépondérance des probabilités, l'existence d'un intérêt public plus important que les valeurs visées par l'engagement implicite. Les exceptions légales, la sécurité publique et la mise en cause de la crédibilité d'un témoignage contradictoire, entre autres, constituaient des circonstances exceptionnelles. La difficulté que présentait l'exception « en cas de crimes » proposée par la Cour d'appel consistait dans le fait que les parties à un litige civil n'étaient pas dans la meilleure position pour déterminer si un crime avait été commis alors qu'un tribunal serait mieux placée pour y arriver. L'exigence de bonne foi telle que proposée par la Cour d'appel n'était pas compatible avec le raisonnement qui doit fonder une exemption judiciaire à l'engagement.
En l'espèce, l'affaire a été réglée en 2006 et, par conséquent, la travailleuse en garderie n'était plus tenue de témoigner à un procès civil et les transcriptions de son interrogatoire préalable n'ont jamais été présentées en preuve. Toutefois, les parties étaient toujours tenues de respecter l'engagement implicite puisque les documents et les réponses n'avaient pas été consignés au dossier de la cour.
Le procureur général a démontré un intérêt suffisant à l'égard des transcriptions des déclarations de la travailleuse en

garderie pour avoir qualité, en l'espèce, pour présenter une demande de modification de l'engagement implicite. Toutefois, il serait injustifié que la police puisse profiter d'un témoignage exigé par la loi en matière civile pour compromettre le droit de la travailleuse en garderie de garder le silence et son droit à la protection contre l'auto-incrimination qui lui sont reconnus en vertu de la Charte des droits et libertés.

Table of Authorities

Cases considered by *Binnie J.*:

Attorney General of Gibraltar v. May (1998), [1999] 1 W.L.R. 998 (Eng. C.A.) — referred to

Bailey v. Australian Broadcasting Corp. (1995), [1995] 1 Qd.R. 476 (Queensland S.C.) — referred to

Bank of Crete S.A. v. Koskotas (No. 2) (1992), [1993] 1 All E.R. 748, [1992] 1 W.L.R. 919 (Eng. Ch. Div.) — referred to

Blake v. Governor & Co. of Adventurers of England Trading into Hudson's Bay (1987), 1987 CarswellMan 230, 22 C.P.C. (2d) 95, (sub nom. *Blake v. Hudson's Bay Co.)* [1988] 1 W.W.R. 176 (Man. Q.B.) — referred to

Cipollone v. Liggett Group Inc. (1986), 81 A.L.R. Fed. 443, 785 F.2d 1108, 4 Fed. R. Serv. 3d 170, 54 U.S.L.W. 2485 (U.S. C.A. 3rd Cir.) — referred to

Commonwealth v. Temwood Holdings Pty. Ltd. (2001), 25 W.A.R. 31 (Western Australia S.C.) — referred to

Crest Homes plc v. Marks (1987), [1987] 2 All E.R. 1074, [1987] 1 A.C. 829, 93 N.R. 256 (U.K. H.L.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 22 C.P.R. (3d) 290, 90 A.R. 323, 61 Alta. L.R. (2d) 319, 1988 CarswellAlta 148 (Alta. C.A.) — referred to

Edmonton Journal v. Alberta (Attorney General) (1989), 1989 SCC 133, [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — distinguished

Eli Lilly & Co. v. Interpharm Inc. (1993), 1993 CarswellNat 307, 161 N.R. 137 (Fed. C.A.) — referred to

Goodman v. Rossi (1995), 37 C.P.C. (3d) 181, 125 D.L.R. (4th) 613, 24 O.R. (3d) 359, 83 O.A.C. 38, 1995 CarswellOnt 146, 12 C.C.E.L. (2d) 105 (Ont. C.A.) — referred to

Harris v. Sweet (2005), 2005 BCSC 998, 2005 CarswellBC 1655 (B.C. Master) — referred to

Home Office v. Harman (1982), [1982] 2 W.L.R. 338, (sub nom. *Harman v. Secretary of State for Home Department)* [1983] 1 A.C. 280, [1982] 1 All E.R. 532 (U.K. H.L.) — distinguished

Hunt v. T & N plc (1995), 1995 CarswellBC 179, 4 B.C.L.R. (3d) 110, [1995] 5 W.W.R. 518, 34 C.P.C. (3d) 133, (sub nom. *Hunt v. Atlas Turner Inc.)* 58 B.C.A.C. 94, 96 W.A.C. 94 (B.C. C.A.) — considered

Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd. (1986), 5 B.C.L.R. (2d) 1, 30 D.L.R. (4th) 65, 15 C.P.C. (2d) 52, 12 C.P.R. (3d) 347, [1986] 5 W.W.R. 481, 1986 CarswellBC 188 (B.C. C.A.) — referred to

Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, (sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, (sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, [2001] 2 S.C.R. 743, 14 C.P.C. (5th) 189 (S.C.C.) — considered

LAC Minerals Ltd. v. New Cinch Uranium Ltd. (1985), 50 O.R. (2d) 260, 48 C.P.C. 199, 17 D.L.R. (4th) 745, 1985 CarswellOnt 462 (Ont. H.C.) — referred to

Laxton Holdings Ltd. v. Madill (1987), [1987] 3 W.W.R. 570, 1987 CarswellSask 331, 18 C.P.C. (2d) 117, 26 C.C.L.I. 121, (sub nom. *Laxton Holdings Ltd. v. Non-Marine Underwriters)* 56 Sask. R. 152 (Sask. C.A.) — referred to

Livent Inc. v. Drabinsky (2001), 8 C.P.C. (5th) 188, 2001 CarswellOnt 717, 53 O.R. (3d) 126 (Ont. S.C.J. [Commercial List]) — considered

Lubrizol Corp. v. Imperial Oil Ltd. (1990), 33 C.P.R. (3d) 49, 39 F.T.R. 43, [1991] 1 F.C. 325, 1990 CarswellNat 114, 1990 CarswellNat 114F (Fed. T.D.) — referred to

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — distinguished

Perrin v. Beninger (2004), 2004 CarswellOnt 2310 (Ont. Master) — referred to

Phillips v. Nova Scotia (Commissioner, Public Inquiries Act) (1995), 1995 CarswellNS 12, 1995 CarswellNS 83, 39 C.R. (4th) 141, 31 Admin. L.R. (2d) 261, (sub nom. *Phillips v. Richard, J.)* 180 N.R. 1, (sub nom. *Phillips v. Richard, J.)* 141 N.S.R. (2d) 1, (sub nom. *Phillips v. Richard, J.)* 403 A.P.R. 1, (sub nom. *Phillips v. Nova Scotia*

(Commission of Inquiry into the Westray Mine Tragedy)) 98 C.C.C. (3d) 20, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 124 D.L.R. (4th) 129, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* [1995] 2 S.C.R. 97, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 28 C.R.R. (2d) 1 (S.C.C.) — referred to

R. v. Henry (2005), 2005 SCC 76, 2005 CarswellBC 2972, 2005 CarswellBC 2973, 260 D.L.R. (4th) 411, 342 N.R. 259, *(*sub nom. *R. c. Henry)* [2005] 3 S.C.R. 609, 49 B.C.L.R. (4th) 1, 219 B.C.A.C. 1, 361 W.A.C. 1, 376 A.R. 1, 360 W.A.C. 1, 33 C.R. (6th) 215, 202 C.C.C. (3d) 449, [2006] 4 W.W.R. 605, 136 C.R.R. (2d) 121 (S.C.C.) — referred to

R. v. Nedelcu (2007), 2007 CarswellOnt 1851, 41 C.P.C. (6th) 357, 46 M.V.R. (5th) 129, 154 C.R.R. (2d) 171 (Ont. S.C.J.) — considered

R. v. S. (R.J.) (1995), 1995 CarswellOnt 2, 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 177 N.R. 81, 21 O.R. (3d) 797 (note), 96 C.C.C. (3d) 1, 1995 CarswellOnt 516, [1995] 1 S.C.R. 451, 78 O.A.C. 161, 121 D.L.R. (4th) 589 (S.C.C.) — referred to

R. v. Serendip Physiotherapy Clinic (2004), 192 O.A.C. 71, 73 O.R. (3d) 241, 25 C.R. (6th) 30, 2004 CarswellOnt 4740, 245 D.L.R. (4th) 88, 189 C.C.C. (3d) 417, 123 C.R.R. (2d) 329 (Ont. C.A.) — referred to

R. v. Shirose (1999), *(*sub nom. *R. v. Campbell)* 237 N.R. 86, 1999 CarswellOnt 948, 1999 CarswellOnt 949, 133 C.C.C. (3d) 257, *(*sub nom. *R. v. Campbell)* 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, *(*sub nom. *R. v. Campbell)* 119 O.A.C. 201, *(*sub nom. *R. v. Campbell)* 43 O.R. (3d) 256 (note), *(*sub nom. *R. v. Campbell)* [1999] 1 S.C.R. 565, 24 C.R. (5th) 365 (S.C.C.) — referred to

Rank Film Distributors Ltd. v. Video Information Centre (1981), [1981] 2 All E.R. 76, [1981] Com. L.R. 90, [1982] A.C. 380 (U.K. H.L.) — considered

Rayman Investments & Management Inc. v. Canada Mortgage & Housing Corp. (2007), 2007 CarswellBC 2168, 2007 BCSC 384 (B.C. S.C.) — referred to

Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd. (1989), 259 A.P.R. 224, 103 N.B.R. (2d) 224, 1989 CarswellNB 397 (N.B. Q.B.) — referred to

Ross v. Henriques (2007), 2007 CarswellBC 2186, 2007 BCSC 1381 (B.C. S.C.) — referred to

Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd. (1998), 62 B.C.L.R. (3d) 366, 27 C.P.C. (4th) 252, 1998 CarswellBC 2350 (B.C. S.C.) — referred to

Shaw Estate v. Oldroyd (2007), 2007 CarswellBC 1387, 2007 BCSC 866 (B.C. S.C.) — referred to

Slavutych v. Baker (1975), [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224, 1975 CarswellAlta 39, 1975 CarswellAlta 145F, [1976] 1 S.C.R. 254, *(*sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587 (S.C.C.) — referred to

Smith v. Jones (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, *(*sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, *(*sub nom. *Jones v. Smith)* 236 N.R. 201, 1999 CarswellBC 590, 1999 CarswellBC 591, [1999] 1 S.C.R. 455, *(*sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, *(*sub nom. *Jones v. Smith)* 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — considered

Solosky v. Canada (1979), 1979 CarswellNat 4, *(*sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630 (S.C.C.) — considered

Stickney v. Trusz (1973), 1973 CarswellOnt 59, 2 O.R. (2d) 469, 25 C.R.N.S. 257, 16 C.C.C. (2d) 25, 45 D.L.R. (3d) 275 (Ont. H.C.) — referred to

Stickney v. Trusz (1974), 3 O.R. (2d) 538, 1974 CarswellOnt 38, 28 C.R.N.S. 125, 17 C.C.C. (2d) 478n, 46 D.L.R. (3d) 80 (Ont. Div. Ct.) — referred to

Stickney v. Trusz (1974), [1974] S.C.R. xii, 28 C.R.N.S. 127 (note) (S.C.C.) — referred to

Sybron Corp. v. Barclays Bank PLC (1984), [1985] 1 Ch. 299 (Eng. Ch. Div.) — referred to

Tricontinental Investments Co. v. Guarantee Co. of North America (1982), 39 O.R. (2d) 614, 30 C.P.C. 235, 141 D.L.R. (3d) 741, 4 C.R.R. 181, 1982 CarswellOnt 509 (Ont. H.C.) — referred to

Tyler v. Minister of National Revenue (1990), 91 D.T.C. 5022, [1991] 1 C.T.C. 13, 120 N.R. 140, *(*sub nom. *Tyler v. Canada (Minister of National Revenue))* 4 C.R.R. (2d) 348, [1991] 2 F.C. 68, 41 F.T.R. 80 (note), 41 F.T.R. 240 (note), 1990 CarswellNat 729, 1990 CarswellNat 496 (Fed. C.A.) — followed

Wilson v. McCoy (2006), 2006 CarswellBC 1645, 2006 BCSC 1011, 59 B.C.L.R. (4th) 1 (B.C. S.C.) — referred to

755568 Ontario Ltd. v. Linchris Homes Ltd. (1990), 1990 CarswellOnt 423, 46 C.P.C. (2d) 157, 1 O.R. (3d) 649 (Ont. Gen. Div.) — considered

Statutes considered:

Canada Evidence Act, R.S.C. 1985, c. C-5

Generally — referred to

s. 5 — referred to
s. 5(1) — considered
s. 5(2) — considered
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
s. 7 — referred to
s. 11(c) — referred to
s. 13 — referred to
Child, Family and Community Service Act, R.S.B.C. 1996, c. 46
s. 14(1) — referred to
s. 14(2) — referred to
Code de procédure civile, L.R.Q., c. C-25
en général — referred to
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to
s. 196 — referred to
s. 487 — referred to
Evidence Act, R.S.B.C. 1996, c. 124
Generally — referred to
s. 4 — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Rules considered:

Federal Rules of Civil Procedure, 28 U.S.C., Appendix
R. 26(c) — referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 30.1 — referred to
R. 30.1.01(6) — referred to
Rules of Civil Procedure, P.E.I. Rules
R. 30.1 — referred to
R. 30.1.01(6) — referred to
Rules of Court, 1990, B.C. Reg. 221/90
R. 2(5) — referred to
R. 27 — referred to
R. 27(2) — referred to
R. 27(22) — referred to
R. 44 — referred to
R. 56(1) — referred to
R. 56(4) — referred to
R. 60(41) — referred to
R. 60(42) — referred to
R. 64(1) — referred to
Queen's Bench Rules, Man. Reg. 553/88
R. 30.1 — referred to
R. 30.1(6) — referred to

APPEAL by daycare employee from judgment reported at *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2006), 55 B.C.L.R. (4th) 66, [2006] 9 W.W.R. 687, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 227 B.C.A.C. 140, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 374 W.A.C. 140, 2006 BCCA 262, 2006 CarswellBC 1275, 31 C.P.C. (6th) 149, 269 D.L.R. (4th) 654 (B.C. C.A.), concerning disclosure of discovery transcript.

POURVOI d'une travailleuse en garderie à l'encontre d'un jugement publié à *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* (2006), 55 B.C.L.R. (4th) 66, [2006] 9 W.W.R. 687, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 227 B.C.A.C. 140, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 374 W.A.C. 140, 2006 BCCA 262, 2006 CarswellBC 1275, 31 C.P.C. (6th) 149, 269 D.L.R. (4th) 654 (B.C. C.A.), au sujet de la divulgation de la transcription de l'interrogatoire au préalable.

***Binnie J.*:**

1 The principal issue raised on this appeal is the scope of the "implied undertaking rule" under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained. The issue arises in the context of alleged child abuse, a matter of great importance and concern in our society. The Attorney General of British Columbia rejects the existence of an implied undertaking rule in British Columbia (factum, at para. 4). Alternatively, if there is such a rule, he says it does not extend to *bona fide* disclosures of criminal activity. In his view the parties may, without court order, share with the police any discovery documents or oral testimony that tend to show criminal misconduct.

2 In the further alternative, the Attorney General argues that the existence of an implied undertaking would not in any way inhibit the ability of the authorities, who are not parties to it, to obtain a subpoena *duces tecum* or to seize documents or a discovery transcript pursuant to a search warrant issued under s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46.

3 The British Columbia Court of Appeal held that the implied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct" ((2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262 (B.C. C.A.), at para. 56). This ruling is stated too broadly, in my opinion. The rationale of the implied undertaking rule rests on the statutory compulsion that requires a party to make documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate. The more serious the criminality, the greater would be the reluctance of a party to make disclosure fully and candidly, and the greater is the need for broad protection to facilitate his or her cooperation in civil litigation. It is true, as the chambers judge acknowledged, that there is an "immediate and serious danger" exception to the usual requirement for a court order prior to disclosure ((2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400 (B.C. S.C.), at paras. 28-29), but the exception is much narrower than is suggested by the *dictum* of the Court of Appeal, and it does not cover the facts of this case. In my view a party is not in general free to go without a court order to the police or any non-party with what it may view as "criminal conduct", which is a label that covers many shades of suspicion or rumour or belief about many different offences from the mundane to the most serious. The qualification added by the Court of Appeal, namely that the whistle blower must act *bona fides*, does not alleviate the difficulty. Many a tip to the police is tinged with self-interest. At what point does the hope of private advantage rob the communication of its *bona fides*? The lines need to be clear because, as the Court of Appeal itself noted, "*non-bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt" (para. 56).

4 Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

5 Here, because of the facts, much of the appellant's argument focussed on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so, and none of them is party to the current proceeding. The applicants are the Vancouver Police Department and the Attorney General of British Columbia supported by the Attorney General of Canada. None of these authorities is party to the undertaking. They have available to them the usual remedies of subpoena *duces tecum* or a search warrant under the *Criminal Code*. If at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the compelled testimony of the appellant. Further, even if the authorities were thereby to obtain access to this compelled material, it would still be up to the court at the proceedings (if any) where it is sought to be introduced to determine its admissibility.

6 I agree with the chambers judge that the balance of interests relevant to whether disclosure should be made by a party of alleged criminality is better evaluated by a court than by one of the litigants who will generally be self-interested. Discoveries (both oral and documentary) are likely to run more smoothly if none of the disputants are in a position to go without a court order to the police, or regulators or other authorities with their suspicions of wrongdoing, or to use the material obtained for any other purpose collateral or ulterior to the action in which the discovery is obtained. Of course the implied undertaking does not bind the Attorney General and the police (who are not parties to it) from seeking a search warrant in the ordinary way to obtain the discovery transcripts if they have the grounds to do so. Apparently, no such application has been made. At

this stage the matter has proceeded only to the point of determining whether or not the implied undertaking permits "the *bona fide* disclosure of criminal conduct" without court order (B.C.C.A., at para. 56). In my view it does not do so in the circumstances disclosed here. I would allow the appeal.

I. Facts

7 The appellant, a childcare worker, provided day services in her home. A 16-month-old child, Jade Doucette, suffered a seizure while in the appellant's care. The child was later determined to have suffered a brain injury. She and her parents sued the owners and operators of the day-care centre for damages, alleging that Jade's injury resulted from its negligence and that of the appellant.

8 The appellant's defence alleges, in part, that Jade suffered a number of serious mishaps, including a bicycle accident while riding as a passenger with her father, none of which involved the appellant, and none of which were disclosed to the appellant when the child was delivered into her care (Statement of Defence, at para. 3).

9 The Vancouver Police have for several years been conducting an investigation, which is still ongoing. In May 2004, the Vancouver police arrested the appellant. She was questioned in the absence of her counsel (A.R., at p. 179). She was later released. In August 2004, the appellant and her husband received notices that their private communications had been intercepted by the police pursuant to s. 196 of the *Criminal Code*. To date, no criminal charges have been laid. In furtherance of that investigation, the authorities seek access to the appellant's discovery transcript.

10 In November 2004, the appellant brought an interlocutory motion to prohibit the parties to the civil proceeding from providing the transcripts of discovery (which had not yet been held) to the police. She also sought to prevent the release of information from the transcripts to the police or the Attorney General of British Columbia and a third motion to prohibit the Attorney General of British Columbia, the police and the RCMP from obtaining and using copies of the transcripts and solicitor's notes without further court order. She relied upon the implied undertaking rule.

11 The Attorney General of British Columbia opposed the appellant's motions and brought his own cross-motion for an order (if necessary) varying the legal undertaking to permit release of the transcripts to police. He also brought a second motion for an order permitting the police to apply for the transcripts by way of search warrant, subpoena or other investigative means in the usual way.

12 The appellant was examined for discovery for four days between June 2005 and September 2006. She claimed the protection of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124, and (though an explicit claim was not necessary) of the *Canadian Charter of Rights and Freedoms*, and says that she answered all the appropriate questions put to her. The transcripts are now in the possession of the parties and/or their counsel.

13 In 2006, the underlying claim was settled. The appellant's discovery was never entered into evidence at a trial nor its contents disclosed in open court.

II. Judicial History

A. Supreme Court of British Columbia (Shaw J.) (2005), 45 B.C.L.R. (4th) 108, 2005 BCSC 400 (B.C. S.C.)

14 The chambers judge observed that an examination for discovery is statutorily compelled testimony by rule 27 of the B.C. *Rules of Court*, B.C. Reg. 221/90. As a general rule, there exists in British Columbia an implied undertaking in civil actions that the parties and their lawyers will use discovery evidence strictly for the purposes of the court case. Discovery exists because getting at the truth in the pursuit of justice is an important social goal, but so (he held) is limiting the invasion of the examinee's privacy. Evidence taken on oral discovery comes within the scope of the undertaking. He noted that the court has the discretionary power to grant exemptions from or variations to the undertaking, and that in the exercise of that discretion courts must balance the need for disclosure against the right to privacy.

15 The chambers judge rejected the contention that the implied undertaking does not apply to evidence of crimes. Considerations of practicality supported keeping evidence of crimes within the scope of the undertaking because such evidence could vary from mere suspicion to blatant admissions and from minor to the most serious offences. It was better to

leave the discretionary power of relief to the courts.

16 As to the various arguments asserted by the appellant under ss. 7, 11(*c*) and 13 of the *Charter*, the chambers judge concluded that "[t]he state is forbidden to use its investigatory powers to violate the confidentiality requirement of solicitor-client privilege; so too, in my view, should the state be forbidden to violate the confidentiality protected by discovery privilege" (para. 62). In his view, it was not open to the police to seize the transcript under a search warrant.

B. Court of Appeal for British Columbia (Newbury, Low and Kirkpatrick JJ.A.) (2006), 55 B.C.L.R. (4th) 66, 2006 BCCA 262 (B.C. C.A.)

17 The Court of Appeal allowed the appeal. In its view, the parties were at liberty to disclose the appellant's discovery evidence to the police to assist in the criminal investigation. Further, the authorities could obtain the discovery evidence by lawful investigative means such as subpoenas and search warrants.

18 Kirkpatrick J.A., speaking for a unanimous court, noted the English law on the implied undertaking of confidentiality had been applied in British Columbia only in recent years. See *Hunt v. T & N plc* (1995), 4 B.C.L.R. (3d) 110 (B.C. C.A.). In that case, however, the British Columbia Court of Appeal had held that "[t]he obligation the law imposes is one of confidentiality from improper publication. It does not supersede all other legal, social or moral duties" (para. 65; quoted at para. 32). Thus, in Kirkpatrick J.A.'s opinion, "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48).

19 Kirkpatrick J.A. then turned to the *Charter* issues in the case. She noted that no charges had been laid against the appellant and therefore that ss. 11(*c*) (which applies to persons "charged with an offence") and 13 (which provides use immunity) were not engaged. The appellant was not in any imminent danger of deprivation of her right to liberty or security, and therefore any s. 7 claim was premature. Kirkpatrick J.A. declared that an implied undertaking, being just a rule of civil procedure, should not be given "constitutional status". Discovery material is not immune to search or seizure. The appeal was therefore allowed.

III. Analysis

20 The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. See B.C. *Rules of Court*, rules 27(2), 44, 60(41), 60(42) and 64(1); *Ross v. Henriques*, [2007] B.C.J. No. 2023, 2007 BCSC 1381 (B.C. S.C.), at paras. 180-81. In Quebec, see *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51 (S.C.C.), at para. 42. In Ontario, see *Stickney v. Trusz* (1973), 2 O.R. (2d) 469 (Ont. H.C.), aff'd (1974), 3 O.R. (2d) 538 (Ont. Div. Ct.), at p. 539, aff'd (1974), 3 O.R. (2d) 538 (Ont. Div. Ct.) (p. 539), leave to appeal ref'd, [1974] S.C.R. xii (S.C.C.). The rule in common law jurisdictions was affirmed post-*Charter* in *Tricontinental Investments Co. v. Guarantee Co. of North America* (1982), 39 O.R. (2d) 614 (Ont. H.C.), and has been applied to public inquiries, *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.).

21 The Attorney General of British Columbia submits that *Lac d'Amiante*, which was based on the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, "was wrongly decided" (factum, at para. 16). An implied undertaking not to disclose pretrial documentary and oral discovery for purposes other than the litigation in which it was obtained is, he argues, contrary to the "open court" principle stated in *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) (factum, at para. 6). The Vancouver Police support this position (factum, at para. 48). The argument is based on a misconception. Pre-trial discovery does not take place in open court. The vast majority of civil cases never go to trial. Documents are inspected or exchanged by counsel at a place of their own choosing. In general, oral discovery is not conducted in front of a judge. The only point at which the "open court" principle is engaged is when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial.

22 In *MacIntyre v. Nova Scotia (Attorney General)*, relied on by the Vancouver Police as well as by the Attorney General of British Columbia, the contents of the affidavit in support of the search warrant application were made public, but not until after the search warrant had been executed, and "the purposes of the policy of secrecy are largely, if not entirely, accomplished" (p. 188). At that point the need for public access and public scrutiny prevail. Here the action has been settled

but the policies reflected in the implied undertaking (privacy and the efficient conduct of civil litigation generally) remain undiminished. Nor is *Edmonton Journal* helpful to the respondents. In that case the court struck down a "sweeping" Alberta prohibition against publication of matrimonial proceedings, including publication of the "comments of counsel and the presiding judge". In the face of such prohibition, the court asked, "how then is the community to know if judges conduct themselves properly" (p. 1341). No such questions of state accountability arise in pre-trial discoveries. The situations are simply not analogous.

A. The Rationale for the Implied Undertaking

23 Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.

24 In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.). The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

26 There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1 (B.C. C.A.), *per* Esson J.A. dissenting, at pp. 10-11.

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). See *Home Office v. Harman* (1982), [1983] 1 A.C. 280 (U.K. H.L.); *Lac d'Amiante*; *Hunt v. T & N plc*; *Shaw Estate v. Oldroyd*, [2007] B.C.J. No. 1310, 2007 BCSC 866 (B.C. S.C.), at para. 21; *Rayman Investments & Management Inc. v. Canada Mortgage & Housing Corp.*, [2007] B.C.J. No. 628, 2007 BCSC 384 (B.C. S.C.), *Wilson v. McCoy* (2006), 59 B.C.L.R. (4th) 1, 2006 BCSC 1011 (B.C. S.C.); *Laxton Holdings Ltd. v. Madill*, [1987] 3 W.W.R. 570 (Sask. C.A.); *Blake v. Governor & Co. of Adventurers of England Trading into Hudson's Bay* (1987), [1988] 1 W.W.R. 176 (Man. Q.B.); *755568 Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1 O.R. (3d) 649 (Ont. Gen. Div.); *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* (1989), 103 N.B.R. (2d) 224 (N.B. Q.B.); *Eli Lilly & Co. v. Interpharm Inc.* (1993), 161 N.R. 137 (Fed. C.A.). Anumber of other decisions are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96.

28 The need to protect the privacy of the pre-trial discovery is recognized even in common law jurisdictions where there

is no implied undertaking. See J. B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation — Current Developments and Future Trends*, October 19, 1991), at pp. 36-40. Rule 26(c) of the United States *Federal Rules of Civil Procedure* provides that a court may, upon a showing of "good cause", grant a protective order to maintain the confidentiality of information disclosed during discovery. 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". See, e.g., *Cipollone v. Liggett Group Inc.*, 785 F.2d 1108 (U.S. C.A. 3rd Cir. 1986).

B. Remedies for Breach of the Implied Undertaking

29 Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.

C. Exceptional Circumstances May Trump the Implied Undertaking

30 The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:

> Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.

In such an application the judge would have access to the documents or transcripts at issue.

D. Applications Should Be Dealt with Expeditiously

31 The injury to Jade Doucette occurred on November 19, 2001. The police investigation was launched shortly thereafter. Almost four years ago the appellant was (briefly) arrested. Three and a half years ago the present court applications were launched. Over two years ago the appellant was examined for discovery. It is apparent that in many of these cases delay will defeat the purpose of the application. It is important that they proceed expeditiously.

E. Criteria on the Application for a Modification or Variance of the Implied Undertaking

32 An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

33 Reference was made to *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074 (U.K. H.L.), where Lord Oliver said, on behalf of the House of Lords, that the authorities "illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery" (p. 1083). I would prefer to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), a case referred to in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a

gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.

34 Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings, (see *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario), and *Rules of Civil Procedure*, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

> If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such direction as are just.

35 The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *LAC Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (Ont. H.C.), at pp. 265-66; *Crest Homes*, at p. 1083; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (Alta. C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520, 2005 BCSC 998 (B.C. Master); *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C. S.C.).

36 On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (Fed. T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (Ont. S.C.J. [Commercial List]), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

37 Some applications have been refused on the basis that they demonstrate precisely the sort of mischief the implied undertaking rule was designed to avoid. In *755568 Ontario Ltd.*, for example, the plaintiff sought leave to send the defendant's discovery transcripts to the police. The court concluded that the plaintiff's strategy was to enlist the aid of the police to discover further evidence in support of the plaintiff's claim and/or to pressure the defendant to settle (p. 655).

(i) The Balancing of Interests

38 As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

(ii) Statutory Exceptions

39 The implied undertaking rule at common law, and in those jurisdictions which have enacted rules, more or less codifying the common law, is subject to legislative override. In the present case for example, the Attorney General of British Columbia and the Vancouver Police rely on s. 14 of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, which provides that:

> (1) A person who has reason to believe that a child needs protection under section 13 must promptly report the matter to a director or a person designated by a director.
> (2) Subsection (1) applies even if the information on which the belief is based
> (a) is privileged, except as a result of a solicitor-client relationship, or
> (b) is confidential and its disclosure is prohibited under another Act.

It is apparent from the extensive police investigation to date and the appearance of the Attorneys General and the Vancouver Police in these proceedings that a report was made to the authorities. We do not know the details. Undoubtedly, a report could have been made without reference to anything said or produced at discovery. At this point the matter has proceeded beyond a mere "report" and involves the collection of evidence. This will require, in the ordinary way laid down by

Parliament in s. 487 of the *Criminal Code*, the application for a search warrant or a subpoena *duces tecum* at trial, if there is a trial.

(iii) Public Safety Concerns

40 One important public interest flagged by the chambers judge was the "public safety" issue raised by way of analogy to *Smith v. Jones*, a case dealing with solicitor-client privilege. While solicitor-client privilege constitutes an interest higher than the privacy interest at issue here, the chambers judge used the case to illustrate the relevant balancing of interests. There, a psychiatrist was retained by defence counsel to prepare an assessment of the accused for purposes of the defence generally, including potential submissions on sentencing in the event of a conviction. During his interview with the psychiatrist, the accused described in considerable detail his plan to kidnap, rape and kill prostitutes. The psychiatrist concluded the accused was a dangerous individual who would, more likely than not, commit future offences unless he received immediate psychiatric treatment. The psychiatrist wished to take his concerns to the police and applied to the court for leave to do so notwithstanding that the psychiatrist's only access to the accused was under the umbrella of solicitor-client privilege. In such a case the accused/client would undoubtedly consider himself to be the victim of an injustice, but our Court held that the privilege yielded to "clear and imminent threat of serious bodily harm to an identifiable group ... if this threat is made in such a manner that a sense of urgency is created" (para. 84). Further, in circumstances of "immediate and serious danger", the police may be contacted without leave of the court (paras. 96-97). If a comparable situation arose in the context of an implied undertaking, the proper procedure would be for the concerned party to make application to a chambers judge but if, as discussed in *Smith v. Jones* there existed a situation of "immediate and serious danger", the applicant would be justified in going directly to the police, in my opinion, without a court order.

(iv) Impeaching Inconsistent Testimony

41 Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment. In provinces where the implied undertaking rule has been codified, there is a specific provision that the undertaking "does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding", see Manitoba r. 30.1(6), Ontario r. 30.1.01(6), Prince Edward Island r. 30.1.01(6). While statutory, this provision, in my view, also reflects the general common law in Canada. An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice: *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 (S.C.C.). Any other outcome would allow a person accused of an offence "[w]ith impunity [to] tailor his evidence to suit his needs in each particular proceeding" (*R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357 (Ont. S.C.J.), at paras. 49-51).

(v) The Suggested "Crimes" Exception

42 As stated, Kirkpatrick J.A. concluded that "the undertaking in the action cannot form a shield from the detection and prosecution of crimes in which the public has an overriding interest" (para. 48). In her view,

> a party obtaining production of documents or transcriptions of oral examination of discovery is under a general obligation, in most cases, to keep such document confidential. A party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court. However, the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct. On the other hand, non-*bona fide* disclosure of alleged criminal conduct would attract serious civil sanctions for contempt. [para. 56]

43 The chambers judge put his finger on one of the serious difficulties with such an exception. He wrote:

> ... considerations of practicality support keeping evidence of crimes within the scope of the undertaking. In this regard, it should be understood that evidence relating to a crime may vary from mere suspicion to blatant admissions, from peripheral clues to direct evidence, from minor offences to the most heinous. There are also many shades and variations in between these extremes. [para. 27]

This difficulty is compounded by the fact that parties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police might achieve, and to pose questions to the examinee to lay the basis for such an approach: see *755568 Ontario Ltd.*, at p. 656. The rules of discovery were not intended to constitute litigants as private attorneys general.

44 The chambers judge took the view that "leaving the discretionary power of exemption or variation with the courts is preferable to giving litigants the power to report to the police, without a court order, anything that might relate to a criminal offence" (para. 27). I agree. On such an application the court will be able to weigh against the examinee's privacy interest the seriousness of the offence alleged, the "evidence" or admissions said to be revealed in the discovery process, the use to which the applicant or police may put this material, whether there is evidence of malice or spite on the part of the applicant, and such other factors as appear to the court to be relevant to the exercise of its discretion. This will include recognition of the potential adverse effects if the protection of the implied undertaking is seen to be diluted or diminished.

45 Kirkpatrick J.A. noted that in some circumstances

> neither party has an interest in or is willing to seek court ordered relief from the disclosure of information under the undertaking or otherwise. Nor does it [the chambers judge's approach] contemplate non-exigent circumstances of disclosed criminal conduct. It is easy to imagine a situation in which criminal conduct is disclosed in the discovery process, but no one apprehends that immediate harm is likely to result. [para. 55]

This is true, but it presupposes that the police are entitled to be handed a transcript of statutorily compelled answers which they themselves have no authority to compel, thereby using the civil discovery process to obtain indirectly what the police have no right to obtain directly. Such a rule, if accepted, would undermine the freedom of a suspect to cooperate or refuse to cooperate with the police, which is an important element of our criminal law.

46 In reaching her decision, Kirkpatrick J.A. relied on *dicta* of the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre* (1981), [1982] A.C. 380 (U.K. H.L.) (p. 425). Lord Fraser said:

> If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution, certainly if he had first obtained leave from the court which ordered the interrogatories, and probably without such leave. ... [p. 447]

These observations, however, must be read in light of the fact that in England, unlike British Columbia, there existed at the time (since amended) "a privilege against compulsory self-incrimination by discovery or by answering interrogatories" (p. 446). There was thus absent from the English procedure the very foundation of the appellant's case, namely that she had *no* right to refuse to answer questions on discovery that might incriminate her, because she was obliged by statute to give the truth, the whole truth and nothing but the truth.

47 It is true that solicitor-client privilege includes a "crime" exception, but here again there is no proper analogy to an implied undertaking. In *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), Dickson J. observed at p. 835:

> ... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant.

See also *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.). Abuse of solicitor-client privilege to facilitate criminality is contrary to its purpose. Adoption of the implied undertaking to facilitate full disclosure on discovery *even by crooks* is of the very essence of its purpose.

In England, the weight of authority now seems to favour requiring leave of the court where the protected material relates to alleged criminality. See *Attorney General of Gibraltar v. May* (1998), [1999] 1 W.L.R. 998 (Eng. C.A.), at pp. 1007-8; *Bank of Crete S.A. v. Koskotas (No. 2)*, [1992] 1 W.L.R. 919 (Eng. Ch. Div.), at p. 922; *Sybron Corp. v. Barclays Bank PLC* (1984), [1985] 1 Ch. 299 (Eng. Ch. Div.), at p. 326. The same practice prevails in Australia: *Bailey v. Australian Broadcasting Corp.*, [1995] 1 Qd.R. 476 (Queensland S.C.); *Commonwealth v. Temwood Holdings Pty. Ltd.* (2001), 25 W.A.R. 31, [2001] WASC 282 (Western Australia S.C.).

48 In reaching her conclusion, Kirkpatrick J.A. rejected the view expressed in *755568 Ontario Ltd.* and *Perrin v. Beninger*, [2004] O.J. No. 2353 (Ont. Master), that the public interest in investigating possible crimes is *not* in all cases sufficient to relieve against the undertaking. It is inherent in any balancing exercise that one interest will not always and in every circumstance prevail over other interests. It will depend on the facts. In *Tyler v. Minister of National Revenue* (1990), [1991] 2 F.C. 68 (Fed. C.A.), in a somewhat analogous situation of statutory compulsion, the appellant was charged with narcotics offences. Revenue Canada, on reading about the charges in a newspaper, began to investigate the possibility that the appellant had not reported all of his income in earlier years. The Minister invoked his statutory powers to compel information from the appellant, who sought to prevent the Minister from communicating any information thereby obtained to the RCMP. Stone J.A., speaking for an unanimous Federal Court of Appeal, agreed that the Minister should be permitted to continue using his compulsory audit for *Income Tax Act* purposes but prohibited the Minister from sharing the information

compulsorily obtained from the appellant with the RCMP. Stone J.A. was of the view that the prosecution of crime did not necessarily trump a citizen's privacy interest in the disclosure of statutorily compelled information and I agree with him.

49 The B.C. Court of Appeal qualified its "crimes" exception by the requirement that the communication to the police be made in good faith. Aside from the difficulties in applying such a requirement, as previously mentioned, I do not see how a "good faith" requirement is consistent with the court's rationale for granting relief against the undertaking. If, as the hypothesis requires, it is determined in a particular case that the public interest in investigating a crime and bringing the perpetrators to justice is paramount to the examinee's privacy interest, the good faith of the communication should no more be an issue here than in the case of any other informant. Informants are valued for what they can tell not for their worthy motives.

50 Finally, Kirkpatrick J.A. feared that

> if an application to court is required before a party may disclose the alleged conduct, the perpetrator of the crime may be notified of the disclosure and afforded the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime. [para. 55]

This concern is largely remedied by permitting the party wishing to be relieved of the obligation of confidentiality to apply to the court *ex parte*. It would be up to the chambers judge to determine whether the circumstances justify proceeding *ex parte*, or whether the deponent and other parties to the proceeding should be notified of the application.

F. Continuing Nature of the Implied Undertaking

51 As mentioned earlier, the lawsuit against the appellant and others was settled in 2006. As a result the appellant was not required to give evidence at a civil trial; nor were her examination for discovery transcripts ever read into evidence. The transcripts remain in the hands of the parties and their lawyer. Nevertheless, the implied undertaking continues. The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. When an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial the undertaking is spent, but not otherwise, except by consent or court order. See *Lac d'Amiante*, at paras. 70 and 76; *Shaw Estate v. Oldroyd*, at paras. 20-22. It follows that decisions to the contrary, such as the decision of the House of Lords in *Home Office v. Harman* (where a narrow majority held that the implied undertaking not to disclose documents obtained on discovery continued even after the documents in question had been read aloud in open court), should not be followed in this country. The effect of the *Harman* decision has been reversed by a rule change in its country of origin.

G. Who Is Entitled to Notice of an Application to Modify or Vary the Implied Undertaking

52 While the issue of notice will be for the chambers judge to decide on the facts of any particular case, I do not think that in general the police are entitled to notice of such an application. Nor are the media. The only parties with a direct interest, other than the applicant, are the deponent and the other parties to the litigation.

H. Application to Modify or Vary an Implied Undertaking by Strangers to It

53 I would not preclude an application to vary an undertaking by a non-party on the basis of standing, although I agree with *Livent Inc. v. Drabinsky* that success on such an application would be unusual. What has already been said provides some illustrations of potential third party applicants. In this case the Attorney General of British Columbia, supported by the Vancouver Police, demonstrated a sufficient interest in the appellant's transcripts to be given standing to apply. Their objective was to obtain evidence that would help explain the events under investigation, and possibly to incriminate the appellant. I think it would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded him by the criminal law. Accordingly, in my view, the present application was rightly dismissed by the chambers judge. On the other hand, a non-party engaged in *other* litigation with an examinee, who learns of potentially contradicting testimony by the examinee in a discovery to which that other person is not a party, would have standing to seek to obtain a modification of the implied undertaking and for the reasons given above may well succeed. Of course if the undertaking is respected by the parties to it, then non-parties will be unlikely to possess enough information to make an application for a variance in the first place that is other than a fishing expedition. But the possibility of third party applications exists, and where duly made the competing interests will have to be weighed, keeping in mind that an undertaking too readily set aside sends the message that such undertakings are unsafe to be relied upon, and will therefore not achieve their broader purpose.

I. Use Immunity

54 Reference was earlier made to the fact that at her discovery the appellant claimed the benefit of s. 5 of the *Canada Evidence Act* which eliminates the right formerly enjoyed by a witness to refuse to answer "any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person" (s. 5(1)). Answers given under objection, however, "shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury" (s. 5(2)). Similar protection is provided under s. 4 of the British Columbia *Evidence Act*. Section 13 of the *Charter* applies without need of objection. Derivative use immunity is a question for the criminal court at any trial that may be held: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 (S.C.C.), at paras. 191-92 and 204. The appellant's statutory or *Charter* rights are not in peril in the present appeal and her claims to *Charter* relief at this stage were properly dismissed.

J. Implied Undertaking Is No Bar to Persons Not a Party to It

55 None of the parties to the original civil litigation applied to vary the undertaking. Neither the Attorneys General nor the police are parties to the implied undertaking and they are not bound by its terms. If the police, as strangers to the undertaking, have grounds, they can apply for a search warrant under s. 487 of the *Criminal Code* in the ordinary way.

56 The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available, only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

57 If criminal charges are brought, the prosecution may also compel a witness to produce a copy of the documents or transcripts in question from his or her possession by a subpoena *duces tecum*. The trial judge would then determine what, if any use could be made of the material, having regard to the appellant's *Charter* rights and any other relevant considerations. None of these issues arise for decision on the present appeal.

K. Disposition of the Present Appeal

58 As stated, none of the parties bound by the implied undertaking made application to the court to be relieved from its obligations. The application is made solely by the Attorney General of British Columbia to permit

> any person in lawful possession of the transcript to provide a copy to the police or to the Attorney-General to assist in the investigation and/or prosecution of any criminal offence which may have occurred.... [B.C.S.C., at para. 6]

While I would not deny the Attorney General standing to seek to vary an implied undertaking to which he is not a party, I agree with the chambers judge that his application should be rejected on the facts of this case. The purpose of the application was to sidestep the appellant's silence in the face of police investigation of her conduct. The authorities should not be able to obtain indirectly a transcript which they are unable to obtain directly through a search warrant in the ordinary way because they lack the grounds to justify it.

IV. Disposition

59 I would allow the appeal with costs to the appellant both here and in the courts below.

Appeal allowed.

Tab B-20

2013 ABQB 27
Alberta Court of Queen's Bench
Kent v. Martin
2013 CarswellAlta 400, 2013 ABQB 27, [2013] A.W.L.D. 1921, [2013] A.W.L.D. 1952, 227 A.C.W.S. (3d) 357, 554 A.R. 204

Arthur Kent, Plaintiff (Applicant) and Don Martin, the National Post Company, Canwest Publishing Inc., National Post Holdings Ltd., Canwest Mediaworks Inc., Kristine Robidoux, Q.C., Roderick Love, Alan Hallman, Bruce Thorpe, Bill Smith and Does 5 - 10, Defendants (Respondents)

W.A. Tilleman J.
Heard: December 21, 2012; January 8, 2013
Judgment: January 14, 2013
Docket: Calgary 0801-08414

Counsel: Michael Bates, for Plaintiff / Applicant
No one for Defendants / Respondents
Subject: Public; Torts; Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Professions and occupations --- Barristers and solicitors — Relationship with others — Solicitor's undertakings — General principles
Plaintiff's application for relief from implied undertaking arose from complex defamation action between him and numerous provincial and national defendants — Plaintiff brought application seeking court's permission under R. 5.33 of Alberta Rules of Court to allow him to report previous counsel to police for conduct that allegedly included concealing conflicting interests and fraud — Application granted — With application being unopposed, matter could proceed to police review — But whether it moved beyond that, and whether it could have or should have even reached this stage, was frankly matter of prosecutional discretion, and applicant's discretion, respectively.
Civil practice and procedure --- Discovery — Introductory — Undertakings
Plaintiff's application for relief from implied undertaking arose from complex defamation action between him and numerous provincial and national defendants — Plaintiff brought application seeking court's permission under R. 5.33 of Alberta Rules of Court to allow him to report previous counsel to police for conduct that allegedly included concealing conflicting interests and fraud — Application granted — With application being unopposed, matter could proceed to police review — But whether it moved beyond that, and whether it could have or should have even reached this stage, was frankly matter of prosecutional discretion, and applicant's discretion, respectively.
Table of Authorities

Cases considered by *W.A. Tilleman J.*:
Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 75 B.C.L.R. (4th) 1, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 372 N.R. 95, (sub nom. *Juman v. Doucette)* [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.)* 252 B.C.A.C. 1, 422 W.A.C. 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 2008 CarswellBC 411, 2008 CarswellBC 412 (S.C.C.) — followed
Henry v. British Columbia (Attorney General) (2012), 2012 CarswellBC 3941, 2012 BCSC 1878 (B.C. S.C.) — considered
Kent v. Martin (2010), 100 C.P.C. (6th) 155, 34 Alta. L.R. (5th) 317, 2010 ABQB 479, 2010 CarswellAlta 1572, [2011] 3 W.W.R. 133 (Alta. Q.B.) — referred to

Rules considered:
Alberta Rules of Court, Alta. Reg. 124/2010
R. 5.31(1) — considered
R. 5.32 — considered
R. 5.33 — considered
R. 5.33(1) — considered

APPLICATION by plaintiff seeking court's permission under R. 5.33 of *Alberta Rules of Court* to allow him to report

previous counsel to police for conduct that allegedly included concealing conflicting interests and fraud.

W.A. Tilleman J.:

Introduction

1 The Plaintiff's application for relief from an implied undertaking arises from a complex defamation action between him and numerous provincial and national Defendants.

2 The Plaintiff seeks the Court's permission under Rule 5.33 to allow him to report his previous counsel to the police for conduct that allegedly includes concealing conflicting interests and fraud.

Procedure

3 Before bringing his application, the Plaintiff served copies of the filed motion and *unfiled* affidavit on all Defendants - and some new Defendants - the idea being to give all opposite parties a chance to seek a ban or sealing order. All Defendants have had a chance to seek restrictions on release of the material or notify the Court of their concerns; nobody opposed. Nobody except the Applicant made submissions.

4 As stated by the Applicant, the facts require that:

1. Arthur Kent ("Kent") seeks leave of the Court to use records and evidence obtained during the conduct of the within proceedings to report, *inter alia*, alleged fraud and fraudulent concealment by his former lawyer of record, Sabri Shawa, Q.C. ("Shawa, Q.C."), to members of the Calgary Police Service, Royal Canadian Mounted Police, or such other law enforcement agency as may be responsible for the investigation and commencement of prosecution for alleged criminal and quasi-criminal offences as may have arisen during the conduct of the within proceedings ("Police Investigation").

2. This Court's permission to file such a report is necessary because the alleged criminal misconduct has occurred during and by way of the civil litigation process. As such, much of the relevant and material evidence of alleged wrongdoing involves acts and omissions of Shawa, Q.C. during or in relation to examinations for discovery. To properly and fully investigate Kent's allegations the Police Investigation will need to review and consider records and discovery transcripts that are otherwise subject to the implied undertaking of confidentiality.

The Law

5 The *Alberta Rules of Court* provide:

Use of transcript and answers to written questions

5.31(1) Subject to rule 5.29, a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 or 5.18 and any of the evidence in the answers of that other party to written questions under rule 5.28 ...

When information may be used

5.32 The transcript of questioning, including exhibits, made under this Division, an affidavit of records, affidavits and answers to written questions, and correcting affidavits under this Division

(a) must not be filed and must not be put before the Court except during an application, proceeding or at trial, and

(b) may be filed and put before the Court only as permitted by these rules,

in which case the person relying on the documents filed must provide the material in writing or in any other form permitted by the Court.

Confidentiality and use of information

5.33(1) The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record for the purpose of carrying on the action in which the information or record was provided or disclosed unless

(a) the Court otherwise orders,

(b) the parties otherwise agree, or

(c) otherwise required or permitted by law.

...

Discussion and Analysis

6 While Rule 5.33 now deals explicitly with implied undertakings in Alberta, the leading case dealing with implied undertakings is *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.) [*Juman*]. The principles in *Juman* have been recently summarized by the B.C. Supreme Court in *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1878 (B.C. S.C.), as follows:

> [42] Pursuant to the implied undertaking rule, evidence compelled during pre-trial discovery can be used only for the purpose of the litigation in which it was obtained. The rule applies to both civil and criminal proceedings: *R. v. Basi*, 2011 BCSC 314.
>
> [43] The rule attempts to balance the public interest in getting at the truth against a litigant's privacy interest. To that end a litigant will be compelled to make full disclosure, but the law imposes on the party an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the proceedings in which the answers or documents were compelled: *Juman* paras. 23-28.
>
> [44] The undertaking is not absolute. It may be trumped by a more compelling public interest and a party may apply to the court for leave to use the information or documents other than in the action in which they were disclosed. An application to modify or be relieved against an implied undertaking requires the applicant to demonstrate on a balance of probabilities the existence of a public interest of greater weight than the values that the implied undertaking is designed to protect: *Juman*, para. 32.
>
> [45] In *Juman*, the court discussed the criteria and factors the court should weigh in determining whether or not to lift an undertaking when an application is made to use material in one action in a different proceeding. The court noted at para. 35 that when discovery material in one action is sought to be used in another action between the same or similar parties and raising the same or similar issues, the prejudice is virtually non-existent and leave will generally be granted.
>
> [46] The implied undertaking continues even after the proceeding in which it originated terminates. The undertaking is, however, spent when the documents become part of the court record at trial but not otherwise, except by consent or court order: *Juman*, para. 51.

7 I believe the above-referenced summary of *Juman* and new Rule 5.33 apply nicely to the case at bar. In other words:

(a) Pre-trial discovery evidence should only be used in the litigation in which it has been obtained, and

(b) if there is a more compelling public interest in doing so, a party may ultimately apply to the Court for leave to use that information in the other "proceeding" if the Court believes the applicant has proven on a balance of probabilities the public interest supports it being used there.

8 In short, the implied undertaking is a significant barrier requiring extraordinary caution in the use of disclosed evidence. And as my reasons below point out, relief from the undertaking need not be given if the information underlying the application is already public.

9 The Applicant properly applies for relief from the implied undertaking - an undertaking that I repeat should only be set aside in rare circumstances: *Juman*, at para 38. This point and a subsequent ruling made by Justice Belzil in an earlier case involving this Plaintiff: (*Kent v. Martin*, 2010 ABQB 479 (Alta. Q.B.)), (2010), 34 Alta. L.R. (5th) 317 (Alta. Q.B.) speak to this caution. Accordingly, the Applicant followed the proper steps in bringing the matter to the Court.

10 Somewhat surprisingly, the current application was not opposed. To me, that nobody would speak to it or even raise a concern, was unforseen. Mr. Shawa's counsel (Mr. Derer) appeared in court, as he was entitled to do, but to watch only. All counsel had notice of the forthcoming affidavit and without any objection or cross examinations, the Plaintiff filed it November 2nd, 2012.

11 Largely on the basis that the application is unopposed and the potential evidence is now filed and failing any examination of that affidavit by any Defendant, I am prepared to relieve the Plaintiff of the undertaking - *subject however* to the preliminary ruling I make below.

12 In making this preliminary decision I stress a couple of points. *First, I am not commenting on the merits of the allegation including whether I think it has the necessary bona fides;* if the police move "full steam" ahead and shouldn't have, there are remedies to deal with that.

13 I also stress, as I did during the Plaintiff's arguments, that I believe overwhelmingly that the proper course of action in a case like this, would be:

(1) first, file a report to the Law Society (who themselves can suggest criminal charges if need be), or
(2) civil action(s) against the previous counsel (if need be).

There are remedies for getting that wrong, too.

14 In summary, with the application being unopposed, the matter can proceed to the police review. But *whether* it moves beyond that, and whether it could have or *should have* even reached this stage, is frankly a matter of prosecutional discretion, and the applicant's discretion, respectively.

Conclusion

15 This is a cautious ruling. On the unique facts of this case, it is not necessary for me at this stage to grant Rule 5.33 relief from the implied undertaking. In other words, while it is true that there is no objection to the application, it is also true that the police or Law Society of Alberta can *already* look at the very lengthy affidavit of Arthur Kent dated August 20, 2012, (filed November 2, 2012) and *decide for themselves* whether a professional investigation is necessary, or criminal conduct has occurred. They are at liberty to do so.

Application granted.

Tab C-1

Clerk's Stamp:	
COURT FILE NUMBER:	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Chamberlain Hutchison #155, 10403 – 122 Street Edmonton, AB T5N 4C1 Attention: Janet Hutchison Telephone: (780) 423-3661 Fax: (780) 426-1293 File: 51433 JLH

Date on which Judgment Pronounced: June 12, 2012

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice D.R.G. Thomas

UPON the application of the Public Trustee; AND UPON review of the Affidavits filed in this proceeding; AND UPON review of the filed written submissions; AND UPON hearing the submissions of Counsel for the Public Trustee, Counsel for the Sawridge Trustees and Counsel for the Sawridge First Nation; IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

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Per:

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Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
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Mr. Justice D. R. G. Thomas

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Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

Tab C-2

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. G. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the "Beneficiaries and Potential Beneficiaries")

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Justice of the Court of Queen's Bench in Alberta

Thomas J

809772;August 31, 2011