

RELIEF FROM THE IMPLIED UNDERTAKING RULE: THE SUPREME COURT SETS GUIDELINES

BY ENRICO FORLINI, FASKEN MARTINEAU DUMOULIN LLP, MONTRÉAL, CANADA

Any party to civil litigation who undergoes pre-trial oral and/or documentary discovery will readily admit that the process involves a significant intrusion on the right to privacy. Indeed, if the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed, no matter how potentially embarrassing, or confidential. As a safeguard against this invasion of privacy, Canadian courts have adopted the implied undertaking of confidentiality rule.¹

In a recent decision, *Juman v. Doucette*², the Supreme Court of Canada has reiterated the importance of this rule. Moreover, it has also provided the legal community with guidelines with respect to the circumstances in which a party may obtain relief from the implied undertaking rule. The purpose of this paper is to review these guidelines proposed by the Superior Court in *Juman*. Before addressing the *Juman* decision, we will review the rationale for the existence of the implied undertaking rule.

The Rationale for the Implied Undertaking Rule

The rationale behind the rule has been consistently recognized as resting on two underlying principles: the protection of privacy rights and the goal of promoting full discovery and full and frank disclosure.

The discovery process forces a party to disclose sometimes massive amounts of information, information that is often in the private realm. This information may relate to trade secrets or other proprietary information, may also be potentially embarrassing, or may even be self incriminating. Nonetheless, because of our discovery rules, parties are under the compulsory obligation to disclose such information. As a corollary to this obligation to disclose such a great volume of information, the courts have recognized that the party that is forced to disclose the information must be afforded some measure of protection. Hence, one of the purposes of the implied undertaking rule is precisely to preserve the individual's right to privacy.³

In *755568 Ontario Ltd. v. Linchris Holmes Ltd.*,⁴ Granger J. stated that the purpose of the implied undertaking rule is to insure full and complete disclosure while maintaining the confidentiality of a private process.

In *LSI Logic Corporation of Canada Inc. v. Logani*,⁵ Fruman J. described the purpose of the implied undertaking as follows:

¹ This concept of an implied undertaking or deemed undertaking exists in every Canadian jurisdiction, including the Province of Québec. For a review of the legal framework relating to this principle, see Papile, Cristiano, "The Implied Undertaking Revisited" (2006), 32 Adv. Q. 190.

² 2008 SCC 8 overturning *Doucette v. WeeWatch Daycare Systems Inc.* (2006) 269 D.L.R. (4th) 654 (B.C.C.A.).

³ *Lac d'Amiante du Québec Ltée v. 2858-0720 Québec inc.*, [2001] 2 S.C.R. 743, 2001 SCC 51, at para. 60.

⁴ (1990) 46 C.P.C. (2d) 157 at para. 12.

⁵ [2001] A.J. NO. 1083 at para.92.

“The implied undertaking rule springs from the requirement that one party in litigation is compelled to provide disclosure to the other. The disclosing party’s privacy rights give way to the need to do justice between the parties in the litigation pending between them. However, the rule protects the confidentiality of the disclosed information and limits the invasion of privacy by confining the use of disclosed information to the litigation then before the court between those parties and not for any other litigation or matter or any collateral purpose.”

In *Goodman v. Rossi*,⁶ the rationale behind the rule was succinctly stated by Justice Morden:

“[T]he principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place.”

This very same rationale has been approved by the Federal Court of Canada in a number of decisions.⁷

Another often quoted rationale in support of the implied undertaking rule relates to the argument that it encourages full disclosure on discovery. Without the rule, many have argued that parties would be reluctant to provide complete and candid answers to questions sought.

Morden J. in *Goodman v. Rossi* agreed with this explanation and quoted with approval the following passage from Matthews and Malek’s *Discovery*:

“A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of Justice require that there should be no disincentive to full and frank discovery.”⁸

In *Lac d’Amiante du Québec Ltée*, the Supreme Court of Canada echoed this sentiment when it stated that “the aim is to avoid a situation where a party is reluctant to disclose information out of fear that it will be used for other purposes.”⁹

In *Juman v. Doucette*, the Supreme Court of Canada reaffirmed the above-mentioned rationales for the implied undertaking rule. Binnie J. wrote that “pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous”.¹⁰

⁶ (1995) 125 D.L.R. (4th) 613 (Ontario Court of Appeal) at p. 621.

⁷ *Merck and Co. v. Apotex Inc.*, [1997] F.C.J. No. 1852; *Sanofi-Aventis Canada Inc. v. Apotex Inc.*, [2008] F.C. 320 (CanLII).

⁸ *Goodman v. Rossi*, supra, at p. 623.

⁹ Supra, at para. 60. See also *Sanofi-Aventis Canada Inc. v. Apotex Inc.*, supra, at para. 17.

¹⁰ At para. 24.

He also stated:

“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*, [1976] 1 S.C.R. 254. 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.”¹¹

As for the second rationale supporting the existence of the implied undertaking rule, he stated:

“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.”¹²

Juman v. Doucette: The Facts

The appellant Juman was a childcare worker and provided daycare services in her home.

In November 2001, Jade Doucette, then 16-months-old, suffered a seizure while in the care of Juman. She was later diagnosed to have suffered a brain injury.

The Vancouver police department conducted a criminal investigation concerning Jade Doucette’s injuries. Juman was interviewed by the police in November 2001.

In November 2003, Jade Doucette and her parents sued the owners and operators of the daycare center for damages, alleging that Jade’s injury resulted from its negligence and that of the appellant Juman.

In May 2004, Juman was arrested by the police and later released. No criminal charges had been laid against Juman as of the day of the ruling issued by the Supreme Court of Canada.

In November 2004, the respondents scheduled an examination for discovery of Juman for December 2004. Shortly before this examination on discovery was to take place, Juman filed a motion in which she sought an order restricting disclosure of the transcript from her examination for discovery. She also sought an order to prohibit the parties to the civil proceedings from

¹¹ Supra, at para. 25.

¹² Supra, at para. 26.

providing the transcripts of her discovery to the police or the Attorney General of British Columbia. In the same motion, *Juman* sought an order to prohibit the Attorney General of British Columbia, the police and the RCMP from obtaining and using copies of the transcripts without further court order. In support of her motion, *Juman* relied upon the implied undertaking rule.

Shortly thereafter, the Attorney General of British Columbia filed a cross-motion in which it sought relief from the implied undertaking of confidentiality so as to allow disclosure of *Juman*'s discovery transcript to the police.

In ruling on the interlocutory motion, the chambers judge reaffirmed the existence of the implied undertaking rule for parties to an action pending in British Columbia. He stated that the rule implies that the parties to the civil action and their lawyers, will use discovery evidence strictly for the purposes of the court case.¹³ The court declared that the Attorney General of British Columbia and the Vancouver police department were under a legal obligation not to cause any of the parties to the action or their solicitors to violate the implied undertaking rule in respect of the proposed examinations for discovery of *Juman*, without the consent of the appellant, or without further order from the Court.

Subsequent to the ruling on the interlocutory motion, *Juman* was examined for discovery for four days between June 2005 and September 2006.

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

On appeal, the British Columbia Court of Appeal allowed the appeal and set aside the lower court's declaration.¹⁴

The Attorney General of British Columbia argued before the Court of Appeal that the implied undertaking did not apply to evidence of crimes. As such, the undertaking would not be violated if the parties provided a transcript of *Juman*'s examination for discovery directly to the police.

In substance, the British Columbia Court of Appeal agreed with this reasoning. Kirkpatrick J.A. held 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".¹⁵

She reasoned that if a party to an action was required to make an application to court before it disclosed the alleged criminal conduct to the police, the perpetrator of the crime would be notified of the discloser and would be given the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime.¹⁶

Kirkpatrick J.A., speaking for a unanimous court, concluded as follows:

¹³ (2005), 45 B.C.L.R. (4th) 108, Supreme Court of British Columbia.

¹⁴ (2006) 269 D.L.R. (4th) 654.

¹⁵ *Supra*, at para. 48.

¹⁶ *Supra*, at para. 55.

“The implied undertaking of confidentiality in the civil discovery process does not preclude the parties to this action from disclosing Ms. McKenzie’s [Juman’s] discovery evidence to the police in good faith for the purpose of assisting the police in their criminal investigation.

The Attorney General of British Columbia, the PVD, and the RCMP may obtain Ms. Mckenzie’s [Juman’s] discovery evidence by lawful investigative means, including subpoenas and search warrants.”¹⁷

On March 6, 2008, the Supreme Court of Canada allowed the appeal from the British Columbia Court of Appeal’s decision. It refused to give to the British Columbia attorney general access to Juman’s pre-trial discovery testimony.

Can a Party be Relieved From its Obligation to Abide by the Implied Undertaking Rule?

The Supreme Court recognized in *Juman v. Doucette* that the implied undertaking is not absolute. As it had stated in the earlier *Lac d’Amiante* decision, the court reiterated that there must be some limits imposed on the rule. The court will retain the power to relieve the persons concerned with the obligation of confidentiality in cases where it is necessary to do so, in the interest of justice.¹⁸ Absent the consent of the party being discovered, the party who is bound by the rule cannot of his own volition use the information and/or documents in a manner that is contrary to the rule. As the Supreme Court stated in *Lac d’Amiante*¹⁹:

“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.”

The Supreme Court also stated in *Juman* that courts must avoid exercising the power to relieve a person from the implied undertaking rule too routinely, as to do so would compromise the usefulness of the rule. In other words, the rule must only be set aside in exceptional circumstances.²⁰

This being said, what guidelines are to be used by the courts in dealing with applications to seek relief from the implied undertaking rule? The Supreme Court addressed this issue in *Juman v. Doucette*.

¹⁷ Supra, at para. 88 and 89.

¹⁸ *Lac d’Amiante du Québec Ltée*, supra, at para. 76

¹⁹ Supra, at para. 77.

²⁰ *Juman v. Doucette*, supra, at para. 30.

Criteria on Applications for Relief From the Implied Undertaking Rule

(i) Balancing of Interests

Three Canadian provinces, Ontario, Manitoba and Prince Edward Island, have codified the implied undertaking rule (the text of the rule is identical in all three provinces).²¹ These same provinces have also enacted rules governing when relief should be given against the implied or “deemed” undertaking. The test formulated in these rules is identical and is as follows:

“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.”

In *Juman v. Doucette*, the Supreme Court of Canada suggests that the “balancing of interests” test codified in the provinces of Manitoba, Ontario and P.E.I. “is apt as a reflection of the common law”.²² In applying this test, Binnie J. wrote that “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 satisfied in exceptional circumstance”.²³

One author has commented on the “balance of interests” test and has argued that one circumstance where relief should be granted is where multiple similarly situated plaintiffs in different suits against the same defendant seek to share information.²⁴ According to this author, relief from the undertaking may be appropriate because:

“... sharing of information would yield efficiency gains. Through information sharing, similarly situated plaintiffs would be spared part of the large expense inherent in the discovery process. The corresponding damage to the defendant would be minimal because that party would have been required to disclose the confidential information to each plaintiff even if relief from the undertaking were not granted. Relief should, of course, extend only to the common plaintiffs.”²⁵

In *Sanofi-Aventis Canada Inc. v. Apotex Inc.*,²⁶ Snider J. succinctly summarized the factors that must be considered in order to determine whether relief should be granted in applying the “balancing of interests” test:

“- The use to which the party seeks leave to put the discovered material. For example, whether relief is sought in order to use the documents in another proceeding or whether relief is sought for a commercial purpose unconnected with litigation.

²¹ Ontario: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1; Manitoba: *Queen’s Bench Rules*, M.R. 553/88, r. 30.1; and Prince Edward Island: *Rules of Civil Procedure*, r. 30.1.

²² *Supra*, at para. 34.

²³ *Supra*, at para. 38.

²⁴ See Papile, “The Implied Undertaking Revisited”, *supra*, at p. 210.

²⁵ *Ibid*, at p. 210.

²⁶ 2008 FC 320 (March 7, 2008) at para. 21, footnotes omitted.

- If the sought-after relief is connected with litigation, whether the parties in the proceeding for which the discovery took place (the Original Proceeding) are the same or similar as the parties in the proceeding in which the documents will be used (the Companion Proceeding);
- If the sought-after relief is connected with litigation, whether the issues or factual background in the Original Proceeding are the same as in the Companion Proceeding;
- Whether the discovered material is inherently confidential;
- Whether the documents obtained through discovery were once publicly available but are now no longer publicly available through no fault of the party seeking relief;
- If the sought-after relief is connected with litigation, whether the party seeking relief in the Original Proceeding wishes to establish a witness has given inconsistent versions of the same fact in the Companion Proceeding;
- If the sought-after relief is connected with litigation, whether the Original Proceeding and the Companion Proceeding are protected by orders of confidentiality;
- Whether granting relief will result in dissemination of the information beyond the parties who already have access to it;
- Whether a third party claim is likely to be initiated against the party who gave the discovery;
- If the sought-after relief is connected with litigation, whether the purposes of the Companion Proceeding can be accomplished by the Original Proceeding;
- If the sought-after relief is connected with litigation, whether the information sought is otherwise compellable; and
- If the sought-after relief is connected with litigation, whether granting relief affects third parties (for example, it results in the commencement of legal proceedings against third parties).”

In addition to the test mentioned hereinabove, the Supreme Court also identified four other circumstances where relief from the implied undertaking rule may be granted.

ii) Statutory Exceptions

Binnie J. stated that the implied undertaking rule, whether at common law or as codified by statute, is subject to legislative override. Thus, if by statute the legislator specifically provides that information and/or documents obtained during the pre-trial discovery process must be disclosed to the relevant authority in a given circumstances, notwithstanding the fact that the disclosure may be otherwise prohibited (i.e. by the implied undertaking rule), then the party will be relieved from the application of the rule.²⁷

²⁷ *Juman v. Doucette*, supra, at para. 39.

iii) *Public Safety Concerns*

Where the facts disclosed during pre-trial discovery give rise to a public safety concern, for example a situation of a public health risk, Binnie J. accepted that this may justify granting relief from the application of the implied undertaking rule.

To illustrate this scenario, Binnie J. referred to the facts of the *Smith v. Jones* case.²⁸ In that case, a psychiatrist was retained by defence counsel to prepare an assessment of the accused for the purposes of the defence. During his interview with the psychiatrist, the accused described in 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 Supreme Court of Canada ruled in *Smith v. Jones* that the psychiatrist, notwithstanding the solicitor-client privilege, was entitled to disclose these facts because of “clear and imminent threat of serious bodily harm to an identifiable group”. Similar facts could obviously lead to relief from the implied undertaking.

According to Binnie J.: “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.”²⁹

iv) *Impeaching Inconsistent Testimony*

In the *Lac d’Amiante* case, the Supreme Court of Canada had already decided that the implied undertaking rule could be set aside where a party wishes to establish in another trial that a witness has given inconsistent versions of the same fact.³⁰

This principle was reaffirmed by Binnie J. in *Juman v. Doucette*. This exception is also specifically contemplated in the three provinces that have codified the implied undertaking rule. Rule 30.1.01 (6) of the *Rules of Civil Procedure of Ontario* states that the deemed 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”.

Binnie J. recognized that this statutory rule reflects the general common law in Canada. Indeed, an implied undertaking to make civil litigation more effective should not permit a witness to play games with the administration of justice.³¹

²⁸ [1999] 1 S.C.R. 455.

²⁹ *Supra*, at para. 40.

³⁰ *Supra*, at para. 77.

³¹ *Supra*, at para. 41.

v) *The Suggested Crimes Exceptions*

The British Columbia Court of Appeal in *Juman* decided that the implied undertaking rule “does not extend to *bona fide* disclosure of criminal conduct”.³² On this point, Binnie J. disagreed with the British Columbia Court of Appeal and proposed a different criteria:

“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 fide*, does not alleviate the difficulty.

(...)

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.”³³

Other Elements of the Implied Undertaking Clarified

The Supreme Court of Canada also clarified other elements of the implied undertaking rule in *Juman v. Doucette*.

i) *Duration*

For example, Binnie J. ruled that the implied undertaking rule ceases to exist when an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial. This position is contrary to the rule as it has been applied in the provinces of British Columbia, Alberta and Nova Scotia.³⁴ Binnie J. also held that the implied undertaking continued to apply in the case at bar notwithstanding that a trial never took place since the matter had been settled out of court. “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”.³⁵

ii) *Who has standing to present an application to modify the implied undertaking*

Binnie J. also held that while success on an application to vary an undertaking by a non-party would be unusual, he did not conclude on an outright preclusion of such applications. He offered the following example where a third party might be justified in filing a motion to seek relief from the implied undertaking rule:

³² Supra, at para. 56.

³³ Supra, at para. 4 and 5.

³⁴ Papile, “The Implied Undertaking Revisited”, supra, at p. 196.

³⁵ Supra, at para. 51.

“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.”³⁶

Conclusion

The Supreme Court of Canada has reiterated the importance of the implied undertaking in *Juman*. As a general principle, “whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order”. The court has also provided useful and clear guidelines as to when and how a person may be able to obtain relief from the implied undertaking. It will be interesting to see how the Court’s guidelines will be applied by lower courts in the years to come.

³⁶ *Juman v. Doucette*, supra, at para. 53.