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PRIVILEGE AND CONFIDENTIALITY
PAPER 8.1

The Implied Undertaking of Confidentiality—Theory and Practice; and a Brief Look at Confidentiality and Sealing Orders

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THE IMPLIED UNDERTAKING OF CONFIDENTIALITY —THEORY AND PRACTICE; AND A BRIEF LOOK AT CONFIDENTIALITY AND SEALING ORDERS

I. Introduction

This paper addresses the confidentiality of material disclosed in the course of legal proceedings in the Supreme Court of British Columbia. It is primarily concerned with the scope and effect of the obligation of confidentiality of discovery material received from the other parties to the litigation – the "implied undertaking" rule. The paper also briefly discusses how that protection can be augmented by express confidentiality agreements and orders; and applications to seal the Court record, or parts of it.

After a ten year period between 1985 and 1995 in which the onus was placed upon a party giving discovery to apply for a confidentiality order in order to protect itself against its production being used for some other purpose, a five member panel of the Court of Appeal made it clear in ***Hunt***

v. T&N [1] that an enforceable obligation of confidentiality attaches to discovery materials and it is the party obtaining discovery that requires the owner's permission or the Court's leave in order to use them for any purpose other than discovery in the litigation in which the production was made.

The Court stated:

> Keeping in mind that pre-trial proceedings are generally private, and that "papers are often the dearest property a man can have", per ***Entinck v. Carrington*** (1765), 95 E.R. 807 at 818, we have no doubt that, prima facie, a party obtaining production of documents is under a general obligation, in most cases, to keep such documents confidential, whether or not they disclose private or confidential material.

As is clear from ***Hunt,*** [2] while the case law and practice employ the term "implied undertaking" the obligation is an obligation that is imposed by law. It is imposed upon both the parties and their representatives. It continues in effect after the case is over. [3]

Accordingly, the responsibilities of counsel with regards to discovery extend not only to ensuring proper production by the client but also that the client understand the obligations of confidentiality that adhere to the discovery it receives. Furthermore the obligation extends directly to counsel and any other person that receives the production, such as an insurer.[4]

Breach of this obligation can have serious consequences for both counsel and client, as any improper use of the documents is a contempt of court.

While the existence of the implied undertaking is well known, and the general aspects of the rule are easy to state, more nuanced issues can arise in practice. This paper will address the following specific issues that arise under the general rule:

- What is covered by the implied undertaking of confidentiality and what is not?
- How does the rule apply to the use of documents and discovery transcripts from other litigation?
- Does the undertaking end once the information becomes part of the court record?
- How hard is it to get judicial relief from the undertaking?

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1 ***Hunt v. T & N plc*** (1995), 4 B.C.L.R. (3d) 110 at para. 63 (C.A.); reversing, *per curiam*, the decision of the Court in ***Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.*** (1986), 5 B.C.L.R. (2d) 1 67 (C.A.).
2 At para. 64
3***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.***, 2001 SCC 51 at para. 76: "The rule applies during the case to both a party and the party's representatives, and it remains applicable after the trial ends".

4 ***Sullivan & Associates Inc. v. Tilson***, 2007 SKQB 115 at para. 17; ***Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada***, 2009 BCSC 1474 at para. 25.

- What are the consequences of a breach of the implied undertaking?

In addition, we will give some consideration to the obtaining of confidentiality orders when, for some reason, it is considered that the implied undertaking is insufficient.

Finally, we will review the basics of obtaining a sealing order in those cases where any publication of confidential information in the Court file threatens extraordinary harm to a party.

II. The Implied Undertaking of Confidentiality: What Is it, and Why Does it Exist?

A. The Rule

Where the implied undertaking of confidentiality applies, a party receiving discovery is circumscribed in the use it may make of the information it obtains. In an oft-cited passage, Lord Denning M.R. stated the common law rule as follows:

> A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. To use a document produced for inspection for a collateral or ulterior purpose is a misuse against which the court will proceed for contempt or by injunction…[5]

The general rule is succinctly stated as follows:

> Generally when a party is obliged by either a rule of court or a court order to give discovery by producing documents or by submitting to oral examination, the party who obtains that discovery is obliged to maintain the documents and testimony in confidence unless relieved of that obligation by court order.[6]

The rule does not arise as a result of a Court Order, or the application of any written rule (at least in British Columbia). Rather, the obligation is imposed by law, and the duty is owed to the Court. Mr. Justice Hobhouse has explained these points as follows:

> This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However, treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (*viz*. contempt of court) and can be relieved or modified by an order of the court. It is thus a formulation of the obligation which has merit and

5 ***Riddick v. Thames Board Mills Ltd.***, [1977] 3 All E.R. 677 at 687 (C.A.)
6 ***Blindman Livestock Feeder Co-Op Ltd. (Receiver of) v. Snyder***, 2005 ABQB 689 at para. 4.

> convenience and enables it to be treated flexibly having regard to circumstances of any particular case.[7]

B. The Rationale

Having described the nature and source of the rule, it is important to briefly address its philosophical underpinnings.

It is clear that the implied undertaking of confidentiality is a procedural safeguard, developed to balance the public interest in encouraging full disclosure so that the truth may be discovered, against a desire to minimize intrusions on privacy. The rationale for the implied undertaking has been described as follows:

> … to ensure full and complete disclosure while maintaining the confidentiality of a private process. The principle driving this undertaking is that the discovery process represents an intrusion on the general right to privacy under the compulsory process 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.[8]

While "privacy" is often referred to as the primary justification for the implied undertaking of confidentiality, other considerations are also relevant, including the promotion of "full discovery". Citing an English text on discovery, the Ontario Court of Appeal has noted that:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on 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.[9]

Thus, the implied undertaking of confidentiality provides a measure of comfort to the reluctant client, who fears documents she must disclose in the litigation process will be misused for other purposes.

Finally, it is important to note that there is a distinction between the concept of privilege and the implied undertaking of confidentiality. Information covered by the implied undertaking rule does

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*7 **Prudential Assurance Co. Ltd. v. Fountain Page Ltd.***, [1991] 1 W.L.R. 756 at 765 (Q.B.D.).
*8 **Colortech Painting and Decorating Ltd. v. Toh***, 2000 ABQB 814, 276 A.R. 262 at para. 34.
9 ***Goodman v. Rossi*** (1995), 24 O.R. (3d) 359 at para. 29 (C.A.), citing ***Matthews and Malek's Discovery*** (1992) at page 253; See also the judgment of Esson J.A in ***Kyuquot*** at para. 67.

not take on a privileged character simply because it has been disclosed in the discovery process; rather, the rule simply restricts how a receiving party may use that information.[10]

III. What is covered by the implied undertaking of confidentiality, and what is not?

The implied undertaking of confidentiality applies to documents and oral evidence produced on discovery by the adverse party.

The scope of the implied undertaking rule was enunciated by the Supreme Court of Canada in ***Juman v. Doucette***, 2008 SCC 8 at para. 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.

The rule is considered so fundamental that in ***Juman*** the Court held that there is no general exception for disclosure of criminal conduct.

Thus, the implied undertaking attaches to <u>all</u> discovery information whether obtained orally during an examination for discovery or in the form of documents.[11] The implied undertaking of confidentiality applies to all documents actually <u>received</u> on discovery, regardless of whether or not any particular document was specifically requested.[12]

It has been assumed that the implied undertaking extends to information provided by third parties on the consent of parties to the litigation or by court order.[13]

It has also been held that the implied undertaking extends to information derived from materials obtained on discovery. In ***Sezerman v. Youle*** (1996), 150 N.S.R. (2d) 161 (C.A.), Mr. Justice Chipman cited the following passage from John B. Laskin, ***The Implied Undertaking in Ontario*** (1989-90), 11 Adv. Q., 298 at 309, with approval:

> It is important to note that the implied undertaking prohibits much more than the actual use of the documents or transcripts themselves. It also protects against the use of their contents. In *Sybron Corpn. v. Barclays Bank plc.*, [1985] 1 Ch. 299, it was held that the implied undertaking prohibits the use of any "information derived from the discovered documents whether it be information embodied in a copy or stored in the mind", unless it can be established that the information was obtained from a source independent of the documents.

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10 ***Juman v. Doucette***, 2008 SCC 8 at para. 56.
11 ***C.P. v. Canada (Attorney General)***, 2003 SKQB 34 at para. 9.
12 ***Discovery Enterprises Inc. v. Ebco Industries Ltd.***, (1997) 42 B.C.L.R. (3d) 192 at para. 16 (S.C.).
13 ***I.C.B.C. v. Titanich***, 2010 BCSC 403.

In a speech concurred in by all the Law Lords, Lord Oliver of Aylmerton held that it "must, in my judgment, clearly be right that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind".[14]

As discussed further below, in the section dealing with materials produced in earlier litigation, it is clear that the implied undertaking does not apply to material that was previously disclosed by the party in question – only material that was received by that party.

i.) Proper use within the proceedings

It is clear that any *bona fide* use for the purpose of advancing the client's case in the proceeding in which the discovery was provided is a perfectly proper use of the discover material. As one Court said:

> [30] Respondents' counsel forcefully made the point that no case imposes any limitation based on the implied undertaking of confidentiality on the use which may be made of information disclosed through discovery in the litigation in which that information is obtained. I accept that as a correct statement of the law in British Columbia.
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> …
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> [47] Imposition of constraints on the parties' use of information obtained through the discovery process in the litigation in which it is obtained, by expanding the scope of the implied undertaking, could inhibit counsel in their investigation of the case and undermine the rationale for court compelled disclosure.[15]

Thus there is no restriction on providing the material to other advisors, such as potential expert witnesses; or to potential witnesses for the purposes of obtaining their evidence; or in the course of a Rule 7-5 examination of a non-party witness; or including the material in an affidavit for any legitimate purpose in the course of the proceedings.

ii) Publicly Available Information?

In ***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.***, 2001 SCC 51 at para. 78, a case arising under the Civil law of Quebec, the Supreme Court of Canada held that the implied undertaking of confidentiality only applies to information that would not have been available other than through discovery:

> The rule of confidentiality will apply only to information obtained solely from that examination, however, and not to information that is otherwise accessible to the public. If the information is available to the public from other sources, a party should not be given the burden of applying to the court for leave before using it merely because it was also communicated at an examination on discovery. The obligation of confidentiality applies only to information that would have remained confidential if the examination on discovery had not taken place.

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14 ***Crest Homes plc. v. Marks***, [1987] 2 All E.R. 1074 at 1078 (H.L.).

15 ***Sovani v. Gray; Jampolsky v. Shattler***, 2007 BCSC 403, leave to appeal ref'd, 2007 BCCA 439.

This passage suggests that the fact that the information is otherwise available means that the obligation of confidentiality does not apply and the party receiving the information is free to use it for other purposes. But the issue is not analyzed in detail and seems a little surprising. A good argument can be made that the rule has a more salutary effect if the receiving party remains prohibited from using the discovery material even if it is available publicly. It is only the publicly available information that the party can use.

This is consistent with ***Hunt***, where, in a passage cited in the introduction to this paper, the Court stated that the obligation to keep documents confidential existed ".. whether or not they disclose private or confidential information".

The Federal Court has held that the undertaking does not attach to information that is otherwise publicly available.[16]

Mr. Justice Savage has referred to this Federal Court authority. He held that it is not a breach of the implied undertaking for a Trustee in Bankruptcy to use a transcript of an examination conducted by the Trustee for the purposes of pursuing a trust claim in civil proceedings since the Bankruptcy and Insolvency Act expressly provides for the filing of the transcript. Nonetheless the decision appears to be based more on the specifics of the statutory provisions dealing with the type of examination than a general rule that information that is publicly available cannot be subject to the implied undertaking. [17]

Conversely, in Alberta it has been held that the undertaking applies even to information that could have been obtained by other legitimate means. This is only a factor to take into account when determining whether a party should be relieved from the undertaking.[18]

In our view, advising a client, or acting on the basis that there is nothing inappropriate in using the actual documents or discovery transcript for purposes other than the advancement of the litigation in which they were disclosed on the basis that the information in question was otherwise publicly available entails some risk, ***Lac d'Amiante*** notwithstanding.

It is a different matter if the information that is proposed to be used is actually obtained from a public source, even though it was also produced in discovery.

In ***Mahon v. Rahn*** [1998] Q.B. 424 (C.A.), the Court held that a party who obtains information from another source is entitled to use that information and is not disqualified from using it because it was later disclosed to him in the context of another action to which he is a party. Staughton L.J. wrote (at pg. 453):

> …a civil litigant is, as it seems to me, forbidden only to use the documents disclosed on discovery by his opponent and the information in them; he remains free to sue in another action on the basis of information which he has obtained from another source. Authority for the first part of the proposition is said to be found in *Sybron v. Barclay's Bank Plc*,

16 ***N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management***, 2002 FCT 1247, aff'd 2004 FCA 210; ***Kirkbi AG v. Ritvik Holdings Inc.***, [2001] 1 F.C. 681 (T.D.).
17 ***Bowell (Trustee of) v. Gill***, 2008 BCSC 1270 at paras. 27-34.
18 ***Ochitwa v. Bombino*** (1997), 153 D.L.R. (4th) 555 at para. 19 (Q.B.).

> [1985] Ch. 299. The second part is supported, so far as I am aware, only by common sense. It cannot be the law that a litigant, having from the start information and evidence which would enable him to bring an action against another, becomes disqualified from using it if that information and that evidence are later disclosed to him on discovery in another action in which he is a party.

Mahon was referred to by Gerow J. in ***Xu v. Ching***, 2005 BCSC 402, varied on other grounds, 2006 BCCA 525, who declined to strike an action pursuant to former Rule 19(24) on the grounds that there was some evidence before the Court that the documents that were allegedly misused were obtained independent of the discovery process.

In our view, Lord Justice Staughton's reasons are consistent with the characterization of the implied undertaking in ***Juman***: It is a rule which constrains the use of materials provided on discovery; it does not cloak such materials with privilege that did not previously exist.

iii) Impeaching Inconsistent Testimony

It has been held that the implied undertaking should not protect a litigant who has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule affords no shield to its use for purposes of impeachment. Justice Binnie has noted that "an undertaking implied by the court to make civil litigation more effective should not permit a witness to play games with the administration of justice… Any other outcome would allow a person accused of an offence with impunity to tailor his evidence to suit his needs in each particular proceeding".[19]

The way in which this public interest is facilitated is through the grant of leave to use the discovery material. In other words, the implied undertaking still applies but leave will usually be obtained for this purpose. There are cases in which the Court has ordered production of discovery transcripts from another proceeding. [20]

iv) Equitable Bills of Discovery

The implied undertaking rule does not apply to proceedings that are brought for the purposes of discovery in order to obtain the foundation for the seeking of substantive relief against an (often unknown) wrongdoer.

In ***Alberta Treasury Branches v. Leahy***,[21] Mason J. concluded that where evidence is gathered pursuant to an equitable bill of discovery (more commonly known as a ***Norwich Pharmacal*** order[22]), no implied undertaking applies.

Mason J. reviewed the law in relation to the implied undertaking and its applicability to information obtained pursuant to ***Norwich*** order. He concluded at para. 276:

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19 ***Juman*** at para. 41.
20 ***Khela v. Sidhu***, 2004 BCSC 971; ***Hoffman v. Percheson***, 2008 BCSC 1267.
21 (2000), 270 A.R. 1 (Alta.Q.B.), aff'd (2002), 303 A.R. 63 (Alta. C.A.), leave to appeal ref'd [2002] S.C.C.A. 235.
22 ***Norwich Pharmacal Co. v. Customs and Excise Commissioners*** [1974] A.C. 133 (H.L.).

> Proceedings within the principles of *Norwich*, as I have found these to be, generally contemplate that the information obtained will be used in another action or against additional parties. The courts have accordingly recognized that the implied undertaking does not even arise in those circumstances. . . . [T]hese authorities establish that the *Norwich* principle applies where evidence has been obtained for the dual purpose of pursuing the action in which it was produced and identifying and pursuing third parties, and that there is no implied undertaking preventing the use of the evidence obtained both against the defendant in the existing action and third parties.

This principle is, however, restricted to proceedings that are clearly of this nature.

IV. How does the rule apply to the use of documents and discovery transcripts from other litigation?

The law in British Columbia is clear: Absent consent or a Court Order, the implied undertaking of confidentiality strictly forbids a party from using materials obtained (i.e. received) in the discovery process in any other proceedings, even if it is consecutive and related litigation between the same parties.[23] Pragmatically speaking, the information cannot be used for the purposes of any proceeding which has a different action number.

In ***Chonn***, Mr. Justice Voith held that:

> [25] A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. …

As indicated above, the implied undertaking of confidentiality only attaches to discovery that is *received.* It does not prevent a party that has *given* discovery from disclosing it in subsequent litigation where otherwise producible.[24] So, for instance, a transcript of an examination for discovery of one of the parties is disclosable *by that party,* if relevant to subsequent litigation, although the party that obtained the discovery is bound by confidentiality and cannot disclose it without agreement of the party that gave the discovery or leave of the Court.

However, as discussed below, where the parties and issues in separate or subsequent litigation are closely related, the Court will readily grant relief from the implied undertaking.[25]

This does not mean that counsel can simply avoid the requisite application to Court. As Newbury J.A. pointed out in ***Edgeworth Construction Ltd. v. Thurber Consultants Ltd.***, 2000 BCCA 453 at para. 15, there is no "exception to the rule to permit procedural "shortcuts". If it is clear that

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23 ***Holman v. Nguyen***, 2000 BCSC 1915; ***Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada***, 2009 BCSC 1474; ***Professional Components Ltd. v. Rigollet***, 2010 BCSC 688 .

24 ***Wilson v. McCoy*** 59 BCLR (4th) 1, 2006 BCSC 1011

25 See for example ***Juman*** at para. 35.

the Court's consent would have been given had it been sought, then it simply should have been sought."

Neither is urgency a sufficient basis for failing to seek the Court's permission to use materials to commence, prosecute, or defend a separate action. In such circumstances, a without notice application is available.[26]

V. Does the undertaking end once the information becomes part of the court record?

It is important to keep in mind that if the action settles before information subject to the implied undertaking is disclosed in court, the undertaking will remain in effect with respect to that information. The fact that a settlement has occurred does not mean the disclosing party's privacy interest is moot. The undertaking continues to bind: If a trial never takes place the information remains confidential.[27]

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."[28]

There has been uncertainty over the years as to whether or not the implied undertaking ceases to apply after documents have been tendered in evidence in open court.[29]

However, the Supreme Court of Canada conclusively decided the issue in ***Juman***, holding that the implied undertaking is spent once the information produced on discovery is introduced as part of the court record at trial:

> 51 ...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.

The Supreme Court of Canada's decision in ***Juman*** was followed in ***International Brotherhood of Electrical Workers, Local 213 v. Hochstein***, 2009 BCCA 355

What the Supreme Court of Canada in ***Juman*** and the Court of Appeal in ***Hochstein*** did not address was whether the implied undertaking of confidentiality is spent whenever information

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26 ***Professional Components*** at para. 23.
27 ***Juman*** at para. 51; ***Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.***, 2001 SCC 51 at para. 65.
28 ***Juman*** at para. 25.
29 See for example ***Discovery Enterprises Inc. v. Ebco Industries Ltd.*** (1997), 42 B.C.L.R. (3d) 192, leave to appeal ref'd (1998) 103 B.C.A.C. 261.

produced on discovery by the opposing party is filed in court on an interlocutory application, as opposed to at trial.

This issue was squarely addressed in ***Bodnar v. The Cash Store Inc.***, 2010 BCSC 660, where the Court was asked to determine whether the implied undertaking of confidentiality ends when the party receiving the information attaches it to an affidavit filed in court on an interim application.

Madam Justice Griffin held it does not. Her Ladyship drew a very careful distinction between evidence adduced "at trial", and material referred to in earlier proceedings. Griffin J. interpreted the Supreme Court of Canada's decision in ***Juman*** as setting out a very deliberate position in this regard:

> [18] The Supreme Court of Canada in *Juman* chose its words carefully when it stated that the implied undertaking is spent when the discovered information is introduced "at trial". The Supreme Court of Canada did not need to modify the words "court record" with the words "at trial" in the above quoted passage. I interpret this as a deliberate attempt to avoid suggesting that the implied undertaking is spent when the discovered information is filed in court on an interim application. Either the Supreme Court of Canada was holding that the implied undertaking is only spent when the documents are introduced at trial, and not when the documents are filed in court on an earlier application; or, the Supreme Court of Canada was declining to opine on the latter situation, leaving the issue for another day.

Griffin J. noted the following rationale for this conclusion:

> [27] At trial there is a vetting process before information becomes part of the court record. The adverse party is present and can object on a wide number of grounds to the admission of information obtained on discovery, including the objections that it is inadmissible hearsay or it is irrelevant to the determination of the issues before the court. Further, in very limited situations, the adverse party can seek to have the information sealed at the time it is admitted into evidence.
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> [28] In contrast, there is no vetting process before the information in an affidavit becomes part of the court record filed in support of an interim application. The party who obtained the information through discovery of the adverse party can simply attach the information to an affidavit and file it in the court file. Under the Rules of Court in this province, this affidavit evidence becomes part of the court record, accessible to the public, even though it may end up being irrelevant and inadmissible at the ultimate trial of the issues: Rule 64(1) (which will be retained as Rule 23-1(1) in the new Rules of Court coming into force on July 1, 2010).
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> [29] Because of this, the defendants argue that there is scope for mischief if the implied undertaking were found to end once materials were filed in the court record as part of an interim application. This result could encourage a party to bring an application needlessly, or to file more evidence in support than it really needs, all toward the goal of getting around the implied undertaking so that it can use the documents for a collateral purpose.

However, in accordance with the observations made in ***Hochstein***, the implied undertaking is lost when the producing party files its own information in the course of an interlocutory application. There can be no concern about abuse of process or a deliberate attempt to circumvent the implied undertaking rule in such a situation, given that the producing party is not

under any undertaking with respect to its own information and was not compelled to produce it in court.[30]

VI. How hard is it to get judicial relief from the undertaking?

In appropriate circumstances a party may apply for the court's leave to use disclosed documents other than in the proceedings in which they are produced. A party can either obtain the owner's permission or the court's leave.[31] Consent of the producing party is sufficient, even though the obligation is owed to the Court.

Relief should be granted where the party's interest in using information that was obtained subject to the rule outweighs the privacy interest at stake. The court must balance the interests of the parties involved to determine the harm and the benefit of the disclosure of the documents. Where the harm suffered by the disclosing party seems insignificant and the benefit to the opposing party seems considerable, the court will be justified in granting leave to use the information.[32]

These competing interests must be considered on a case by case basis. In ***Schreiber v. Canada (Attorney General)***, 2000 ABQB 536, Burrows J. described the balancing that must be carried out by the Court before a party will be relieved from the undertaking:

> [12] The requirement that a litigant submit to discovery is an intrusion on the litigant's interest in privacy and the confidentiality of private information. That intrusion is permitted in order to ensure that there is full disclosure, and therefore a better chance of a just result, in the action in which the discovery occurs. The implied undertaking exists to limit the effect of the intrusion by ensuring that the information is used only for the purpose for which the litigant is obliged to provide it.
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> [13] Relieving the litigant who has received the discovery information from the undertaking upsets the balance the undertaking is intended to create. It should only be done where the interest sought to be advanced through the use of the otherwise confidential discovery information outweighs the litigant's privacy and confidentiality interests. The same interests which are brought into balance by the undertaking must be reassessed to determine which has greater significance. If disclosing a litigant's privacy interest outweighs the interest sought to be served by disclosure, the undertaking should be kept in place. If the interest to be served by disclosure is more significant, relief from the undertaking should be granted.

The Court in ***Juman*** explained that the onus of establishing that the implied undertaking should be relaxed in a particular case will be on the party seeking the modification:

> 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…What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified

30 ***Bodnar*** at para. 47.
31 ***Hunt v. T & N plc***, [1995] 5 W.W.R. 518 at para. 64 (B.C.C.A.); ***Juman*** at para. 30.
32 ***Xu v. Ching***, 2005 BCSC 402 at para. 68, aff'd 2006 BCCA 525.

> or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.[33]

Justice Binnie suggested that the party seeking leave must "specify the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application."[34] Where there are legitimate reasons for doing so, the application may be brought without notice.[35]

Additionally, "Courts are particularly reluctant to grant general relief from the undertaking. Instead, Courts often direct that a party come to court to request relief from the undertaking with respect to each specific intended use or disclosure that the party wishes to make outside the litigation."[36]

Courts do not take the principle of privacy lightly, and applications for relief are frequently denied. As Lord Keith of Kinkel pointed out, "discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs."[37]

It has been said that the authorities on the question "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".[38]

The requirement of "special circumstances" has been mentioned in subsequent authorities.[39] In ***Visx Inc. v. Nidek Co.*** (1998), 80 C.P.R. (3d) 437 (F.C.T.D.) Rothstein J., as he then was, summarized the factors bearing upon relief from the implied undertaking rule as:

> 1. the existence of special circumstances; and
>
> 2. the weighing of the injustice between the parties between granting or denying the application for relief from the rule.

However, the jurisprudence surrounding the "special circumstances" requirement rests uncomfortably with the balancing exercise called for by ***Juman***. The better view is that the Court should simply balance the interests of justice and relative interests of the parties without determining whether the case before the Court presents "special circumstances".[40]

Courts have generally not favoured attempts to use the discovered material for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. A non-party to the implied undertaking may in unusual

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33 At para. 32.
34 ***Juman*** at para. 30.
35 ***Juman*** at para. 50.
36 David Wotherspoon & Alex Cameron, ***Electronic Evidence & E-Discovery*** (LexisNexis, 2010) at pg. 88.
37 ***Harman v. Secretary of State***, [1983] 1 A.C. 280 at 308.
38 ***Crest Homes plc v. Marks***, [1987] 2 All E.R. 1074 at 1083 (H.L.).
39 See for example ***Cortés v. Yorkton Securities Inc.***, 2003 BCSC 482 at para. 20; ***Sendagire v. Co-Operators General Insurance Co.***, 2009 SKQB 265 at paras. 46-47.
40 ***Sanofi-Aventis Canada Inc. v. Apotex Inc.***, 2008 FC 320 at para. 20

circumstances apply to have the undertaking varied, but relief in such cases will virtually never be given, as this is the precise mischief sought to be avoided by rule.[41]

In contrast, cases where the information is sought to be used in related proceedings between similar parties the interest against disclosure is less compelling and there are a number of cases in which it has been stated that modification of the implied undertaking will generally be ordered:

> 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.[42]

In ***Bodnar***, Madam Justice Griffin observed that when considering an application to relieve from the undertaking where documents have been tendered in interlocutory proceedings, the court may consider, as one factor in support of leave, the fact that the information was filed in court for a legitimate purpose and became part of the court record (at para. 45).

VII. What are the consequences of a breach of the implied undertaking?

Breach of the implied undertaking is punishable by contempt of court, but courts may apply other unique remedies, such as prohibiting use of the information in question, striking pleadings, or even staying an action that has been commenced based on information protected by the undertaking. The Ontario Court of Appeal has made the following point:

> Depending on how the issue arises, [remedies other than contempt of court] may be more appropriate, such as an injunction, before any improper use has occurred, or, as in this case, a motion to stay or dismiss a proceeding. In some cases, however, for example, where the breach has occurred and there is no other appropriate remedy, contempt proceedings may be the only avenue.[43]

In ***Juman***, the Supreme Court of Canada explained the remedies available for breach of the implied undertaking as follows:

> 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.[44]

It is also open to the Court to remove counsel of record for the party in breach. However, in circumstances where counsel have proceeded carefully and not acted "in a cavalier manner", but have nonetheless breached the implied undertaking of confidentiality, the Court may decline to grant any remedy at all.[45]

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41 ***Juman*** at paras. 36, 53.
42 ***Juman*** at para. 35.
43 ***Goodman v. Rossi*** (1995), 24 O.R. (3d) 359 at 371 (Ont. C.A.).
44 At para. 29.
45 ***I.C.B.C. v. Titanich***, 2010 BCSC 403 at paras. 22-23.

The implied undertaking is an obligation owed by counsel and litigants to the Court. Accordingly, a mere breach of the undertaking is not in and of itself a tort. It is clear that the breach does not create a private law cause of action.[46]

A. Contempt

As noted in ***Juman***, contempt is a remedy of last resort. Additionally, in many cases it will afford a hollow remedy to the innocent party, where the damaging effects of disclosure have already been suffered.

However, it is a remedy which Courts are prepared to grant. For example, in ***Orfus Realty v. D.G. Jewelery of Canada Ltd.*** (1995), 24 O.R. (3d) 379 (C.A.), the court found the plaintiff and its principal officer to be in contempt of court by reason of their breach of the implied undertaking. Their penalty was to pay the costs of the contempt application and appeal on a solicitor and client basis.

Similarly, in ***Colby v. Ruiz***, 2005 NSSC 287, Goodfellow J. found that a fit and proper penalty to accompany a finding of contempt for breaching the implied undertaking was to award a reimbursement of some of the innocent party's legal expenses on a solicitor and client basis.

A solicitor may personally be found in contempt of court where documents are used in breach of the undertaking. As Lord Diplock noted:

> ... This is why an order for production of documents to a solicitor on behalf of a party to civil litigation is made upon the implied undertaking given by the solicitor personally to the court (of which he is an officer) that he himself will not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of court by the solicitor himself....[47]

In ***Sandbar Construction Ltd. v. Howon Industries Ltd.*** (1998), 58 B.C.L.R. (3d) 55 (S.C.) the court confirmed that the contempt remedy was available against a lawyer who was in breach of the implied undertaking. In that case, the defendant's lawyer had provided an affidavit appending documents obtained on discovery to a lawyer who acted for a third party in a separate action.

B. Prohibition on Use

The Court has the inherent jurisdiction to enjoin a party from using information in breach of the implied undertaking of confidentiality. This relief was granted in ***Litton v. Braithwaite***, 2006 BCSC 1481, where the court prohibited the plaintiff from using documents relating to her husband's financial affairs. The Court found that she had commenced her action, in part, for an improper purpose: To obtain discovery of her husband's financial affairs, which she had failed to obtain through the discovery process in their divorce action. In the circumstances, Halfyard J. concluded "the plaintiff should not be permitted to make use of any such documents, for any purpose."

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46 *McDaniel v. McDaniel*, 2008 BCSC 653 at para. 33, varied on other grounds, 2009 BCCA 53.
47 *Home Office v. Harman*, [1983] 1 A.C. 280 at 304 (H.L.).

C. A Destruction Order

Where a party threatens to breach the implied undertaking of confidentiality, the Court may order it to return or destroy any documents that are the subject of the undertaking.

This relief was granted against the Crown in ***Andersen Consulting v. Canada***, [2001] 2 F.C. 324 (T.D.), where the Department of Justice informed the plaintiff after the settlement of a lawsuit it was of the view that the documents it obtained through discovery could never be returned or destroyed in view of their legal obligation to retain them and turn them over to the National Archives.

Hugessen J. rejected the Crown's submission and awarded the plaintiff special costs, noting that "as a matter of practice, at least in my experience in this Court, [the implied undertaking] usually includes an obligation on the part of the receiving party to return or destroy the documents (those which have not become part of the public record) at the conclusion of the litigation."

D. Striking pleadings or staying an action

It is within the inherent jurisdiction of the court to strike a statement of claim as a remedy for the breach of an implied undertaking. The Rules of Court do not apply in the circumstances.[48]

In England, that law is that "an action based on a misused document will, ordinarily, be dismissed as an abuse of process."[49]

In two cases, ***Goodman v. Rossi***, and ***Glenayre Manufacturing Ltd. v. Pilot Pacific Properties Inc.***, 2004 BCSC 864, the court struck out claims by reason of a violation of the implied undertaking of confidentiality.

In ***Goodman***, the plaintiff had sued her employer for wrongful dismissal. Through the discovery process in that action, she obtained a document which was a report made by an officer of the defendant to a Provincial Government ministry. The report included comments that were critical of the plaintiff's ethical conduct. The plaintiff then commenced a new action against the officer who had filed the report, for defamation, based solely on the report obtained in her wrongful dismissal action.

The defendant in the defamation action applied for summary judgment dismissing the action on the ground that the claim was based on evidence obtained by the plaintiff in her other action for wrongful dismissal. The plaintiff filed a cross-application seeking an order granting her leave to use the report obtained in the other action. The Court held that the plaintiff's use of evidence constituted a breach of the implied undertaking.

In determining the appropriate remedy (or if leave should be granted to the plaintiff to use the document, *nunc pro tunc*), the court examined the potential prejudice to each of the parties. The plaintiff alleged that she would be denied the opportunity to clear her name with the ministry, if

48 ***Professional Components Ltd. v. Rigollet***, 2010 BCSC 688 at para. 33.
49 ***Mahon v. Rahn***, [1998] Q.B. 424 at 431 (C.A.), *per* Otton L.J.

she could not use the report discovered in her other action. The potential prejudice to the defendant was said to be "not only the injustice of being penalized for having made full discovery but, also, the risk of prejudice in the form of exerting extraneous pressure with respect to the settlement of the unjust dismissal action."

The court concluded that the injustice to the defendant outweighed the injustice to the plaintiff. Accordingly, the plaintiff's application for relief from the implied undertaking was dismissed, and the action was permanently stayed.

In ***Glenayre Manufacturing***, Melnick J. found that the plaintiff had breached the implied undertaking of confidentiality, by using documents obtained on discovery in one action, to form the basis of a new action. The court noted that the plaintiff had used the documents without first obtaining the consent of the defendants or the sanction of the court. Melnick J. refused to approve of the plaintiff's use of the documents *nunc pro tunc*, and ordered that the writ of summons and statement of claim in the second action be struck out.

However, the Court found that it was just and convenient to join the defendant named in the second action as a party to the first action and effectively preserved the pre-trial relief obtained in the second action without break.

In two other (and more recent) cases, the Court declined to stay or strike a second action which was commenced in breach of the implied undertaking.

In ***Professional Components Ltd. v. Rigollet***, 2010 BCSC 688 the plaintiffs used information obtained in one action to draft pleadings in a second action. The defendants in the second action applied to have the claim struck out on the basis that the plaintiff had breached its implied undertaking. The court reprimanded the plaintiff for breaching the implied undertaking, but allowed the second action to continue:

> 55 … In the present case, it would have been preferable for the plaintiff to ask permission rather than arguing now for forgiveness, but I doubt that a *nunc pro tunc* order here will have the effect of encouraging lawyers to use disclosed material without first seeking the consent of the other party or leave of the court.
>
> 56 I am satisfied that the interests of justice favour granting the plaintiff leave to use the discovery evidence, including the meta data in the expert's report, *nunc pro tunc* for the purposes of the Copyright Action…

Similarly, in ***I.C.B.C. v. Titanich***, 2010 BCSC 403 the defendant complained when the plaintiff made improper use of documents obtained from the RCMP in a previous proceeding, and although the court found that a breach of the implied undertaking had occurred, it declined to strike out the plaintiff's claim, as the plaintiff's counsel had not acted in "a cavalier manner but rather was proceeding carefully".

VIII. Express Confidentiality agreements

The existence of the implied undertaking of confidentiality makes an express order unnecessary in most cases. However, in extraordinary circumstances the Court does have the power to make an express confidentiality order. [50]

The kind of circumstances that might be considered exceptional may include concerns about disclosure of trade secrets; intellectual property cases; competing trade litigants or confidential governmental information. [51] In those cases, the potential prejudice maybe so great that the added disincentive of an express order may be appropriate, particularly if additional procedural provisions are to be included (discussed below).

Lynn Smith J. also recognised that express confidentiality orders may be appropriate where the Court is ordering disclosure for the purposes of foreign litigation and there is evidence of actual pr potential criminal proceedings and the right to be free from self-incrimination is in issue. [52] More generally, an express order may be of assistance where there is litigation in progress or anticipated in other countries in which the concept and parameters of the implied undertaking may be unclear.

An express confidentiality order will be required if it is sought to restrict the persons who may see the disclosed information. For instance, while rare, "counsel's eyes only" orders are not totally unknown. The circumstances necessary to persuade the Court to make such an order are very rare indeed. [53]

An order may be appropriate where there are significant confidentiality concerns in order to provide for greater procedural protections than are provided by the implied undertaking. Such provisions can include: a requirement that persons to whom the information is provided sign an express undertaking of confidentiality in order to impress upon them the seriousness of the situation; a requirement that confidential documents not initially be filed in Court in support of interlocutory applications but delivered to the party which disclosed the information in order to give it to an opportunity to object to the use of the information or to seek a sealing order[54]; procedures for the return of the information after the proceedings are over[55].

A form of confidentiality order is attached as Schedule A to this paper.

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50 ***Knight v. Imperial Tobacco Canada Ltd.*** 2009 BCSC 339; ***Hanson v. Keystone Ford Sales Ltd.*** [1996] M.J. No. 432' 138 D.L.R. (4th) 767; ***Parsons v. McDonald's Restaurants of Canada Ltd.*** [2003] O.J. 4732; 48 C.P.C. (5th) 396

51 ***Knight*** at para. 7

52 ***Echostar Satellite Corp. v. Quinn***, 2007 BCSC 1225 at paras. 67 and 79 to 82

53 ***Merck v. Apotex***, 2004 FC 567; ***Columbia Pictures Industries Inc. v. Wang*** [2008] SKQB 126

54 ***Knight*** at para. 11

55 ***Knight*** at para. 13.

IX. Sealing orders

Although there is a presumption in favour of public access to court documents, the court has a supervisory and protecting power over its records, and access can be denied when the ends of justice would be subverted by disclosure or the documents might be used for an improper purpose. Further, access to court proceedings may be restricted to ensure protection of innocent parties.[56]

The Supreme Court of Canada discussed the topic of openness of courts in ***Toronto Star Newspapers Ltd. v. Ontario***, 2005 SCC 41, [2005] 2 S.C.R. 188. Mr. Justice Fish said the following in paras. 1 to 4:

> 1. In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration.*

The leading case on sealing orders is ***Sierra Club of Canada v. Canada (Minister of Finance)*** , [2002] 2 S.C.R. 522 at 543-544, in which the Supreme Court of Canada set out the test for granting a confidentiality order with respect to material *filed with the court*. Such a confidentiality (sealing) order may be granted if:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

56 ***A.-G. N.S.*** **v.** ***MacIntyre*** [1982] 1 S.C.R. 175 (S.C.C.), per Dickson J. (as he then was) at 189

> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

In *Blue Line Hockey Acquisition Co v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 1483, 78 B.C.L.R. (4th) 100, Madam Justice Wedge considered an application by the media for access to an exhibit in litigation between private parties in relation to private interests. She noted that the balancing of competing interests is somewhat different in such litigation as a result of reasonable expectations of privacy. Madam Justice Wedge discussed how the balancing of those interests should be determined in terms of the opening words of the reasons in *Toronto Star*:

> [49] I return then to the words of Fish J. in *Toronto Star*. Will a balancing of the competing interests in this case create a "cloud of secrecy" under which justice will wither? The answer must be "no".

This formulation of the test was approved by Tysoe J.A. (in chambers) in ***Sahlin v. The Nature Trust of B.C.*** 2010 BCCA 516.

If a sealing order is to be obtained, a strong case for it must be made in the affidavit material filed in support of the application.

It is much easier to obtain an order where what is sought is not the sealing of the entire Court file but portions of the record. This can be achieved, for example, by sealing selected materials (such as affidavits) that contain the sensitive material and replacing them in the record with redacted versions.

A sample sealing order is attached as Schedule B.

X. Schedule A—Form of Confidentiality Order

SCHEDULE A

No. <*>
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

<*>

PLAINTIFF

AND:

<*>

DEFENDANTS

ORDER

BEFORE THE HONOURABLE	)	<*>DAY, THE <*> DAY OF
	)	
MR. JUSTICE <*>	)	<*> 20<*>

THE APPLICATION of the Defendant <*> coming on for hearing at Vancouver, British Columbia, on <*>, 20<*> AND ON HEARING <*>, counsel for the Plaintiff <*> and <*>, counsel for the Defendant, <*>, and upon reading the material filed.

THIS COURT ORDERS that:

1. Any documents or materials produced or otherwise disclosed in this action (the "Action") designated by <*> ("<*>") as "Confidential Documents" in its List of Documents and any Supplemental List(s) of Documents shall be treated by the parties, their counsel and experts and their respective office personnel, as confidential. In addition to being used by the Plaintiff and Co-Defendants only for the purpose of the Action, the Confidential Documents shall be subject to the provisions of this Order.

2. <*> shall only designate as Confidential Documents those documents that [set out any criteria that can be used to reduce the volume of documents that can legitimately be marked "confidential]

3. Any documents or materials designated as a Confidential Document shall be marked by <*> as follows: "Confidential Document – <*> v. <*> and <*>, Supreme Court of British Columbia Action No. <*>".

4. If counsel for the Plaintiff or the Co-Defendants believes that any particular document produced by the other party is not properly designated as a Confidential Document, counsel may challenge such designation by raising the matter with the Court. If the Court finds that the document at issue is not properly designated, such document shall not be subject to this Order.

5. Confidential Documents and the information contained therein shall not be disclosed by counsel for the Plaintiff and/or Co-Defendant to any persons other than lawyers and staff of that counsel EXCEPT THAT counsel for the Plaintiff and/or the Co-Defendant may disclose copies of Confidential Documents to their clients (or a representative of a corporate client) and may disclose copies of Confidential Documents to third persons when such counsel considers disclosure to such persons to be necessary or appropriate for the preparation for, and the conduct of, the trial of the Action and any interlocutory proceedings. Prior to any such disclosure, counsel shall obtain the written agreement and undertaking of such persons to keep such copies of Confidential Documents and the information contained therein confidential, to refrain from copying them or disclosing them to any other third person, and to use them only for the purposes of assisting counsel in preparation for, and the conduct of, the trial of the Action or any interlocutory proceedings. This written agreement and undertaking shall be obtained through the third party's execution of the writing provided in the attached Schedule "A".

6. The parties shall not file affidavits prior to the hearing of the interlocutory proceedings to which they relate until after the interlocutory proceeding is heard and shall be at liberty to make application at the hearing of the interlocutory proceeding to seek a sealing order with respect to any Confidential Documents or information contained therein which form part of the affidavit material.

7. Upon final termination of the Action after any appeals are complete, counsel for all parties shall assemble and deliver to <*> solicitors within 60 days all Confidential Documents, including all copies.

BY THE COURT

REGISTRAR

APPROVED AS TO FORM:

<*>
Counsel for the Plaintiff <*>

<*>
Counsel for the Defendant, <*>

SCHEDULE A

I hereby agree and undertake to keep copies of documents provided to me which are marked with the following legend:

"Confidential Document – <*> v. <*> and <*>, Supreme Court of British Columbia Action No. <*>"

and the information contained in the Confidential Documents, confidential, to refrain from copying them or disclosing them to any other third person, and to use them only for the purposes of assisting counsel in preparation for, and the conduct of, the trial of the above-noted action Action or any interlocutory proceedings in that Action.

[Insert Signature, printed name and address of person signing undertaking and witness and dates of execution]

XI. Schedule B—Sample Sealing Order

SCHEDULE B

No. <*>
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PETITIONER

AND:

RESPONDENTS

O R D E R

BEFORE THE HONOURABLE JUSTICE) TUESDAY, THE <*> DAY OF
)
) <*>, 20<*>

THE APPLICATION of the Respondent, <*>., coming on for hearing at Vancouver, British Columbia, on the <*> day of <*>, 20<*>; AND ON HEARING <*>, counsel for the Respondent, <*>, and <*>, counsel for the Petitioner and upon reading the material filed.

THIS COURT ORDERS that

1. The following documents be sealed by the Registrar of this Honourable Court until further order of the Court :

(a) The Petition;

(b) The Amended Petition filed <*>;

(c) Affidavit #1 of <*>, sworn <*>("<*> Affidavit");

(d) The transcript of the proceedings in chambers on the hearing of this application.

(the "Sealed Documents").

2. Access to the Sealed Documents be restricted to following persons:

(a) The parties to this action;

(b) The solicitors for the parties to this action;

(c) Any Master or Judge of this Court; and

(d) Registry staff of this Court.

3. The redacted copies of the Petition and <*> Affidavit attached as Exhibit A to the affidavit #1 of <*>sworn <*>, 20<*> (the "<*> Affidavit") be filed in the Court file and be available to the public without restriction.

4. The redacted copy of the Amended Petition attached as Exhibit A to the affidavit #1 of <*> sworn <*>, 20<*> be filed in the Court file and be available to the public without restriction.

5. Any person is at liberty to apply to unseal the Sealed Documents, or any part thereof, or vary this Order, upon 7 days clear notice to <*>.

BY THE COURT

APPROVED AS TO FORM:

DISTRICT REGISTRAR

Counsel for the Petitioner

Counsel for the Respondent, <*>

Confidentiality in the litigation process: The implied undertaking; confidentiality and sealing orders

Mark Andrews Q.C.
Fasken Martineau DuMoulin, Vancouver
June, 2011

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The implied undertaking rule

- Imposes an obligation of confidentiality
- Upon a persons receiving discovery information
- which prohibits use of that received discovery information for any purpose other than use in the litigation

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Rationale

- Protects privacy interests and property rights in confidential information
- Protects the integrity of the litigation process and fosters proper discovery by assuring parties that are compelled to disclose information that the information will only be used for the litigation and will otherwise be kept confidential
- The rule and the ability to seek leave to modify it attempts to find the right balance between the public interest in the proper administration of justice, including the open Court principle, and privacy and property rights

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What does it cover?

- Documents received by a person that are disclosed pursuant to discovery obligations in the rules or ordered to be produced
- Includes documents received from third parties, even where the documents are produced without an order (although an express confidentiality undertaking would be wise)
- Oral discovery of adverse parties
- All information contained in that documentary production or oral discovery: *Sybron; Sezerman*

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Who is bound?

- The obligation of confidentiality is imposed upon the parties and their representatives, agents and privies: it applies directly to counsel, insurers and anyone who receives the information
- Counsel should explain this to clients and anyone else to whom the information is to be provided

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Permitted use – Fact Pattern A

- X sues Y for breach of trust. X seeks tracing remedies and a constructive trust over any property into which the alleged trust funds were converted by Y
- X obtains an order that Y disclose bank records which show that X used some of the alleged trust funds to purchase a building in the name of Y Co, which is not an defendant.
- Concerned about the possibility of transfers or mortgages now that the information has been disclosed, A commences an action against Y Co and files a CPL against the building
  - A: Breach
  - B: No Breach

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Permitted use – Fact Pattern A

A. Breach
B. No Breach

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Permitted use – the specific proceeding

- The discovery material may only be used in the specific proceeding in which it is produced
- An exception to this likely exists where the proceeding in which the information is obtained is in the nature of an equitable bill of discovery – a *Norwich Pharmacal* application: *Leahy*
- The purpose of such proceedings is to obtain information for use in other proceedings (often against an as-yet unknown wrongdoer)

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Permitted use – nature of use

- There is no restriction on how the received discovery information may be used within the specific proceeding
- It may be shared with experts or other advisors
- Shown to witnesses
- Filed in support of interlocutory applications – including applications to join new parties
- Any good faith use to advance the proceedings is allowed

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Prohibited use

- Received discovery information may not be given to the media (even if that is seen as a tactic to advance the case through settlement pressure)
- May not be given to counsel in related proceedings
- May not be used for the purposes of seeking an opinion as to whether new litigation should be commenced or for drafting pleadings for a new action: *Chonn*
- May not be given to the client or a third party for commercial use (Obviously!)
- May not be given to the authorities, even where a crime is suspected: *Juman*

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Is the obligation terminated by filing in Court? Fact Pattern B

- Discovery documents received from Y and portions of the oral discovery of Y are filed by X in court in support of a successful application to join additional defendants
- The action settles. Counsel for X is assisting counsel for Z in an action against Y in Alberta.
- Can the publicly filed documents and discovery be used in the Alberta litigation?
  - A: Without leave of the Court B: Only with leave?

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Is the obligation terminated by filing in Court? Fact Pattern B

- Without leave of the Court
- Only with leave?

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Filing in Court; durability of the obligation

- When discovery material becomes part of the trial record it is no longer covered by the obligation of confidentiality: *Juman*
- When the party receiving the discovery material files it in Court in interlocutory proceedings, it is not relieved from the obligation: *Bodnar*
- When the party that produced the discovery material chooses to file the material in interlocutory proceedings, the receiving party is no longer subject to the obligation to keep the material confidential: *Bodnar*
- Absent filing the confidentiality obligation endures for ever

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The discovery material is available to the public Fact Pattern C

The rule of confidentiality will only apply to information obtained solely from the discovery and not to information that is otherwise accessible to the public

A. True
B. Not True
C. Risky

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Publicly available information

- The SCC in *Lac d'Amiante* says that the obligation does not apply to information that is publicly available
- *Hunt* indicates otherwise
- Probably safe if the information that is actually used came from a publicly available source, notwithstanding the fact that it was also delivered in discovery: *Mahon, Xu*
- But what if the discovery information was delivered first and the publicly available source was found after the receiving party was alerted to the existence of the information by the discovery material" Derivative use? *Sybron, Sezerman*

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Documents and discovery transcripts from prior proceedings: Fact Pattern D

- You act for a plaintiff in an action against a professional. The loss arises from a prior action in which your client was found liable for damages. You now allege that it was the professional's negligence that caused the loss
- In the prior proceedings your client was examined; the professional was also examined as an agent of your client; and the plaintiff was examined
- All the transcripts contain highly relevant information. The issue is which, if any of these transcripts need to be produced by you?

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Documents and discovery transcripts from prior proceedings: Fact Pattern D

A. All 3 transcripts
B. Only the plaintiff's
C. Only the client's
D. The Professional's and the client's but not the plaintiffs
E. None of them

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Documents and discovery transcripts from prior proceedings

- Documents in prior litigation which were *provided by* the party in question are not covered by the obligation of confidentiality and must be produced if otherwise producible in the second proceedings
- The same practice seems to be followed for discovery transcripts
- Documents and oral discovery *obtained from* another party are subject to the obligation and can only be produced in the second proceedings by agreement of that party or leave of the Court (in which case the providing party should be given notice of the application)

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Relief from the undertaking

- The test for leave is whether the interest sought to be advanced through the use of the otherwise confidential discovery information outweighs the litigant's privacy and confidentiality interests? *Juman*, *Schreiber*
- The onus is on the applicant who must explain what use is contemplated and why
- Leave is often granted where the litigation is related in subject matter and parties or to prevent inconsistent testimony
- Leave is rarely granted where use is sought in wholly unrelated subsequent proceedings in the absence of compelling reason

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Consequence of breach

- A breach is contempt of court
- Remedies include: injunction, stays of proceedings or striking of pleadings, costs, damages, imprisonment (!)
- The Court may decline to order any remedy where the interests of justice indicate that is the right result, or grant leave *nunc pro tunc*

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Express Confidentiality orders

- Confidentiality orders are generally not ordered unless there are exceptional circumstances, on the theory that the implied undertaking is sufficient
- Quite often both parties want one, in which case the Court will usually oblige, although a confidentiality agreement may suffice
- Confidentiality orders are made where there is a heightened concern about confidentiality such as in trade secret or trade competition cases, intellectual property cases, cases involving confidential government information
- Also where the Court's assistance is sought for discovery in aid of foreign proceedings and there is a concern about use of the material

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Useful additional protections that can be included

- A requirement that anyone receiving the information sign an express confidentiality undertaking – it is more salutary than an implied obligation
- Procedure allowing a party to object to the filing of confidential information prior to its being filed in Court, so that its filing can be challenged or a sealing order sought
- Procedures for the return of the confidential information (often coupled with restrictions on the manner in which may be copied or distributed during the litigation)

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Sealing orders

- Courts are now cautious about granting orders sealing the Court file because of the open court principle
- There is a presumption of public access
- The applicant must show:
  - Necessity to prevent a serious risk to an important interest, including a commercial interest, where reasonably alternative measures will not prevent the risk; and
  - The salutary effects of the order outweigh the deleterious effects including the public interest in an open court

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Sealing orders

- A test applied in BC is that the sealing order must not "create a cloud of secrecy" under which justice will wither: *Blue Line, Sahlin*
- The supporting affidavit material must be strong
- It is much easier to obtain such an order where it is partial: where the material sought to be sealed is as limited as necessity requires and is replaced with redacted material so that the public and media can still understand what is going on

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