INTRODUCTION

The word “undertaking”, when used outside of the legal setting, has many meanings: “the management of funerals”; “the act of engaging in a project or business”; “a promise, pledge or guarantee”. When used in law, the word undertaking often has a meaning similar to “promise, pledge, or guarantee”, but express undertakings given by lawyers are more significant than regular promises, pledges, or guarantees, because in addition to being liable for breach of contract a lawyer breaching an undertaking may be subject to disciplinary action.

Lawyers often give express undertakings (e.g. to not release funds to their client until certain documents are signed and / or filed) and breach of such express undertakings may be a breach of professional ethics: *Law Society of British Columbia Professional Conduct Handbook*, s. 11-7.

Implied undertakings are different to express undertakings because they arise without any positive agreement by the party to be bound: the implied undertaking rule automatically applies when one party to litigation discloses information related to the dispute to another party to the litigation under compulsion of the Rules of Court. According to the rule, lawyers and their clients are bound to keep such information confidential and to not use it, without the owner’s permission or leave of the court, for a collateral purpose.

Although some provinces have codified implied undertakings, they exist at common law. In *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (Ont. C.A.) the Ontario Court of Appeal noted that all Canadian jurisdictions that have considered whether implied undertakings should be imposed at common law have held that they should. More recently, the Supreme Court of Canada cases of *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 and *Juman v. Doucette*, 2008 SCC 8 confirmed the existence of implied undertakings at common law.

Information covered by the implied undertaking rule is not privileged (*Juman v. Doucette*, 2008 SCC 8 at para. 56), rather the rule simply restricts how a receiving party may use information governed by an implied undertaking. The implied undertaking obligation is also separate and distinct from obligations under *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165: see *Sovani v. Gray et al.; Jampolsky v. Shattler et al.*, 2007 BCSC 403 at paras. 33-40.

FUNDAMENTAL ASPECTS OF THE IMPLIED UNDERTAKING

The test for existence of an implied undertaking

All information disclosed under compulsion of the Rules of Court is governed by the implied undertaking:

> The implied undertaking of confidentiality is a rule that requires a party to civil litigation to keep confidential all information disclosed by adverse parties in the litigation under the compulsion of discovery procedures.
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 2).

Conversely, information not obtained through the discovery procedures of the Rules of Court is not covered by the implied undertaking:

> Disclosure of that report, if it were made to non parties, does not come within the rubric of the implied undertaking of confidentiality since it was not obtained through the litigation discovery process.
> (*Sovani v. Gray et al.; Jampolsky v. Shattler et al.*, 2007 BCSC 403 at para. 22).

The implied undertaking of confidentiality applies even though the information disclosed may not have been confidential or otherwise sensitive to begin with:

> [The implied undertaking] covers innocuous information that is neither confidential nor discloses any wrongdoing at all.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 5).

Both documentary and oral information obtained on discovery is subject to the implied undertaking: *Juman v. Doucette*, 2008 SCC 8 at para. 4.

The effect of the implied undertaking

The effect of the implied undertaking rule is, quite simply, that the information cannot be used for any purpose other than for litigating the case it was disclosed in.

> The receiving party is only to use the disclosed information in the litigation in which it was produced.
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 2).

> The law delineating the scope of the implied undertaking of confidentiality respecting use of information obtained through the litigation discovery process draws a bright line. Use of that information within the litigation is permitted use. Use outside the litigation for an "alien" or "collateral" purpose is not permitted without the consent of the affected party or an order of the court.
> (*Sovani v. Gray et al.; Jampolsky v. Shattler et al.*, 2007 BCSC 403 at paras. 48-49).

Except in exigent circumstances, the restriction on use applies unless and until the party disclosing the information consents to collateral use of the information or a court order permitting collateral use is granted:

> [B]oth documentary and oral information obtained on discovery…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.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 4).

> [T]he rule prohibits that party from using it for purposes other than preparing for the trial and defending his or her interests at trial, or from disclosing it to third parties, without specific leave from the court.
> (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 42).

The rationale for implied undertakings

The implied undertaking rule is justified on the view that full disclosure is required in civil litigation to ensure that justice is done, and that such disclosure is more likely where privacy interests are protected as much as possible. This rationale has been stated by various courts as follows:

> 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.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 25).

> A party to a civil proceeding is under compulsion to produce information in order to comply with discovery rules. The implied undertaking of confidentiality provides some protection of privacy by assuring the litigant that the information will not be used for a collateral purpose outside the litigation. This encourages the litigant to live up to his or her wide discovery obligations and so indirectly aids in getting at the truth in a civil action.
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 21).

> [T]he preferred approach [to civil discovery] is a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible. In return for this freedom to investigate, an implied obligation of confidentiality has emerged in the case law, even in cases where the communication is not the subject of a specific privilege… 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. The aim of this procedure is also to preserve the individual's right to privacy.
> (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 42).

> 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.
> (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (Ont. C.A.) citing Matthews & Malek, Discovery (London: Sweet & Maxwell, 1992) at 253).

The implied undertaking rule binds both lawyer and client (and insurer)

In *Harman v. Home Office*, [1982] 1 All E.R. 532 (H.L.) the House of Lords explained that the implied undertaking rule binds counsel:

> [The order for production of documents to a solicitor on behalf of a party] is made on the implied undertaking 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.
> (*Harman v. Home Office*, [1983] 1 A.C 280 at 304, [1982] 1 All E.R. 532 (H.L.)).

That rule applies equally in Canada:

> The rule applies during the case to both a party and the party's representatives, and it remains applicable after the trial ends [in relation to information not disclosed to the court during trial].
> (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 76. See para. 65 of that case for authority for the qualification stated in the square brackets).

In *Juman v. Doucette*, 2008 SCC 8 the Supreme Court of Canada confirmed that clients are bound by the implied undertaking rule. In that case a childcare worker was sued after a child in her care suffered a brain injury. The childcare worker gave evidence on examination for discovery and that information became known to the child's parents. The Supreme Court of Canada confirmed that the parents would have had to apply for a court order permitting them to disclose the information obtained on discovery to the police had they wanted to make such disclosure:

> Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure, but none of them did so…
> (*Juman v. Doucette*, 2008 SCC 8 at para. 5).

> [T]he law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled…

(*Juman v. Doucette*, 2008 SCC 8 at para. 27, emphasis added).

The foregoing confirms that both lawyers and clients are bound by implied undertakings with respect to information disclosed under compulsion of the Rules of Court.

In *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 the court held that the defendants' insurer was also bound by the implied undertaking:

> 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. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation.
> (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 25).

The undertaking is owed to the court, not the disclosing party

The implied undertaking is owed to the court rather than the party that disclosed the information covered by the undertaking (*Professional Components Ltd. v. Rigollet*, 2010 BCSC 688 at para. 23), but the disclosing party may relieve the receiving party from the obligations of the undertaking:

> [W]here the party being discovered does not consent [to collateral use of the information], a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 30).

Express undertaking will seldom be ordered

The implied undertaking is an all encompassing rule designed to protect the privacy interests of litigants and except in exceptional cases it will be considered sufficient for that purpose; only were serious risk of prejudice is shown will the court expressly order confidentiality: *Knight v. Imperial Tobacco Canada*, 2009 BCSC 339. An express undertaking was ordered in *Vetshopaustralia Pty. Ltd. v. Pivotal Partners Inc.*, 2008 BCSC 1336 at para. 65 where the defendant was particularly concerned about disclosure of sensitive business information.

CODIFICATION OF THE IMPLIED UNDERTAKING IN SOME PROVINCES

A number of provinces have codified the implied undertaking:

- Ontario: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1.01;
- Manitoba: *Queen's Bench Rules*, M.R. 553/88, r. 30.1;
- Prince Edward Island: *Rules of Civil Procedure*, r. 30.1.01.

Those statutes, which all have similar wording, create a "deemed" undertaking rule i.e. the undertaking is deemed to apply upon information being disclosed on discovery.

> All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.
> (Rule 30.1.01(3), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194).

Subsection (4) of Rule 30.1.01 provides that the undertaking does not apply if the person who disclosed the information consents, to evidence filed with the court, or to evidence given or referred to during a hearing. Subsection (8) of Rule 30.1.01 codifies the courts discretion to order that the implied undertaking does not apply in particular cases.

The statutes also provide that the deemed undertaking rule "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". This is a codification of the common law rule that an exception to the implied undertaking rule applies for the purposes of impeaching inconsistent testimony: see discussion below.

The case of *T1T2 Limited Partnership v. Canada (Attorney General)* (1996), 48 C.P.C. (3d) 84, 3 O.T.C. 127 (Gen. Div.) suggests that the common law implied undertaking still exists independently of the deemed undertaking rule. See also *Goodyear v. Meloche* (1996), 50 C.P.C. (3d) 398, 41 C.B.R. (3d) 112, 2 O.T.C. 174 (Gen. Div.).

THE SCOPE OF THE IMPLIED UNDERTAKING

Information which is otherwise publicly available

In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 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.
> (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 78).

The Federal Court has also held that the undertaking does not attach to information that is otherwise publicly available: *N.M. Paterson & Sons Ltd. v. St. Lawrence Seaway Management*, 2002 FCT 1247 (F.C.T.D.) *Kirkbi AG v. Ritvik Holdings Inc.* (2000), 10 C.P.R. (4th) 531, 196 F.T.R. 214 (F.C.T.D.).

In some provinces, the rules of civil procedure allow anyone to apply for disclosure of information filed in court. For example, under Rule 23-1(1) of the British Columbia *Rules of Court*, B.C. Reg. 168/2009, any person can apply for documents contained in a civil proceeding file in the British Columbia Supreme Court registry:

> *Copy of document filed in registry*

> (1) Unless otherwise provided by an enactment, a person may, on payment of the proper fees, obtain from the registry a copy of a document on file in a proceeding

Therefore, it may be that a party to litigation may be able to argue that information disclosed on discovery is not subject to the implied undertaking where it was filed in court in another proceeding; but see discussion below re effect of limited disclosure of implied undertaking information in interlocutory proceedings. Note that limits on obtaining information from the registry may apply in criminal and family matters.

The implied undertaking applies even to documents not specifically requested

The implied undertaking of confidentiality applies to all documents actually received on discovery, regardless of whether or not any particular document was specifically requested:

> [T]he implied undertaking applies not only to materials which the recipient party has sought disclosure of, but even to materials of which it did not seek disclosure but which were nonetheless produced.
> (*Discovery Enterprises Inc. v. Ebco Industries Ltd.*, (1997) 42 B.C.L.R. (3d) 192 at para. 16 (S.C.)).

Information about third parties

In *Juman v. Doucette*, 2008 SCC 8 the Supreme Court of Canada considered whether, in litigation between A and B, information disclosed on discovery about C could be used in separate proceedings against C. Although that issue did not arise on the facts in *Juman*, Binnie J., writing for the court, indicated that discovery information could not be used for proceedings against third parties:

> It includes the wrongdoing of persons other than the examinee…
> (*Juman v. Doucette*, 2008 SCC 8 at para. 5).

Information obtained from third parties

The implied undertaking applies not only to information produced by the parties to the litigation, but also to information produced by third parties by the consent of the parties or by court order:

> [I]t is worthy of note that the discovery in issue in the matter at hand did not emanate from a party to the litigation. It does not consist of either oral or documentary discovery produced by Mr. Spinks. It is, rather, information gathered by the police in a process entirely independent of this litigation. I note this not because it necessarily follows that documents produced by third parties are not subject to the implied undertaking but rather because it is a factor that may be taken into account in determining whether a remedy ought to be granted.
> …
> Assuming that the undertaking extends to documents produced by third parties to earlier litigation but relating to the conduct or affairs of a party to that litigation, I am satisfied that the plaintiff breached the implied undertaking.
>
> (*I.C.B.C. v. Titanich*, 2010 BCSC 403 at paras. 15 and 18).

Interrogatories and the implied undertaking

In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 the Supreme Court of Canada indicated that under the Quebec rules of civil procedure interrogatories were not subject

to the implied undertaking of confidentiality because they are part of the court record: *Lac d'Amiante* at para. 67.

In the earlier case of *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (Ont. C.A.) the Ontario Court of Appeal indicated that the implied undertaking does cover information provided in response to interrogatories:

> In the English text Matthews and Malek, Discovery (1992) at page 312 the opinion is expressed that "[a]lthough there is no reported authority as to whether the implied undertaking on discovery in relation to documents applies to interrogatories, it is submitted that in principle the implied undertaking does extend to interrogatories, as they are a form of discovery, to which answers are given under compulsion and not being provided voluntarily."
> (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (Ont. C.A.)).

In British Columbia answers to interrogatories are not filed in court as a matter of course and may never be entered into evidence at trial nor filed in interlocutory proceedings. For that reason, it seems there is little to distinguish them from other information obtained during document production and examination for discovery to which the implied undertaking clearly appplies. It would likely be prudent for counsel to treat answers to interrogatories as covered by the implied undertaking until such information is entered into evidence at trial or perhaps (see discussion below) filed in interlocutory proceedings.

Formal admissions and the implied undertaking

In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 67 the Supreme Court of Canada indicated that, in Quebec at least, formal admissions are not subject to the implied undertaking of confidentiality because they are part of the court record. In British Columbia admissions made in response to a Notice to Admit do not get filed in the registry or disclosed in court as a matter of course and as noted above for interrogatories, until such information is disclosed in court it seems the implied undertaking should prevail.

Post judgment discovery

In *Procon Mining and Tunnelling Ltd. v. McNeil*, 2010 BCSC 1184 the court said that "[t]here is a legitimate question whether the implied undertaking does apply to post-judgment discovery" (para. 17), but expressly declined to decide the issue because the parties expressly agreed to treat the information obtained on post-judgment discovery in conformity with implied undertaking principles.

Examinations under the BIA

Examinations under s. 163 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 are not covered by the implied undertaking: *Re Bowell Estate v. Gill*, 2008 BCSC 1270 at paras. 21-34.

SCOPE OF PERMISSIBLE USE

Statement of the principle

In *Hunt v. Atlas Turner Inc.*, 1995 CanLII 1800 (B.C.C.A.) the British Columbia Court of Appeal explained that information subject to the implied undertaking may be used for proper purposes within the litigation such information was originally disclosed in:

> "proper use" …[includes]…the right to disclose such documents to other advisors, such as potential expert witnesses, here or elsewhere as counsel may advise. Such, in our view, is proper use in the proceedings. Similarly, the obligation should not be construed rigidly... The obligation the law imposes is one of confidentiality from improper publication. It does not supersede all other legal, social or moral duties.
> (*Hunt v. Atlas Turner Inc.*, 1995 CanLII 1800 at para. (B.C.C.A.)).

In *Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC the plaintiff in a personal injury action objected to the defendant describing in an affidavit to be used for a document production application, and disclosed to third parties for that purpose, material subject to the implied undertaking. The chambers judge rejected that objection and found that the implied undertaking did not prevent such disclosure to third party record holders. That decision was approved of by Chaisson J.A. in refusing leave to appeal to the British Columbia Court of Appeal:

> [The chambers judge] relied on the clear language of [*Hunt v. Atlas Turner Inc.*, 1995 CanLII 1800 (B.C.C.A.)] in declining to [find that the defendant had made improper use of the information subject to the implied undertaking]. That language is found repeatedly throughout *Hunt* and the many cases referred to in that case. *Hunt* itself has been referred to in at least three cases by this court and in all of them reference is made to the words "in connection with the litigation in which they were produced".
> (*Jampolsky v. Shattler*, 2007 BCCA 439 at para. 15).

Thus information subject to the implied undertaking may be used for legitimate steps taken in furtherance of the litigation the information was originally disclosed in.

Implied undertaking information maybe provided to expert witnesses

Permissible use includes disclosure to expert witnesses: *Hunt v. Atlas Turner Inc.* (1995), 4 B.C.L.R. (3d) 110 at para. 65 (C.A.)).

Implied undertaking information may be served on proposed targets of court order

In *Roberts v. Singh et al*, 2006 BCSC 906 the plaintiff admitted on discovery that he was working and being paid under the table at the same time he was claiming social assistance payments. The defendants sought production of the plaintiff's social assistance file from the Ministry of Human Resources to obtain documents to further undermine the plaintiff's credibility, and served a copy of the application materials on the Ministry of Human Resources. Those application materials included a copy of the discovery transcript of the plaintiff containing the admissions as to welfare fraud. The plaintiff counterclaimed for breach of the implied undertaking, but the application was refused on the basis of procedural irregularities and the master's lack of jurisdiction to make findings of contempt.

The issue arose again in *Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 where defence counsel summarized information subject to an implied undertaking in an affidavit to be used in support of a document production application. The affidavit (but not the exhibits to the affidavit) was then sent to various third party record holders from whom the defendant sought production of records (see para. 14). Plaintiff's counsel objected to disclosure of the information summarized in the affidavit to the third parties, and sought an order that defence counsel and various ICBC employees had committed contempt of court in providing such information to the

third parties. In rejecting the plaintiff's application, the court held that the implied undertaking did not prevent disclosure of information to third party record holders:

> [N]o 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.
> (*Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 at para. 30)
>
> 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.
> (*Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 at para. 47).

The reasoning of Edwards J. in *Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 was affirmed in *Jampolsky v. Shattler*, 2007 BCCA 439 where Chiasson J.A. declined to grant leave to appeal his decision. Special costs were awarded against the plaintiff for bringing what the court considered to be an overly aggressive and improper application for contempt of court: *Jampolsky v. Shattler*, 2010 BCSC 408.

Implied undertaking information may be used in examination of non-party witness

The court in *Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 held that information covered by the implied undertaking may be used in the discovery of non-party witnesses:

> One of the defendants' applications in that case was for an order under Rule 28 to examine the plaintiff's former girlfriend. Suppose the order was made and the examination proceeded. Ought the defendants' counsel to be put at risk of being found in contempt of court for asking the witness about matters of the plaintiff's health which arose at the discovery of the plaintiff or through examination of his health records obtained through disclosure from a non party? Ought the defendants' counsel to be at risk of being found in contempt of court for disclosing that information in the application to court, served on the girlfriend so as to give her the opportunity to resist the application that she be examined by averring she has no knowledge of these matters?
>
> The law delineating the scope of the implied undertaking of confidentiality respecting use of information obtained through the litigation discovery process draws a bright line. Use of that information within the litigation is permitted use. Use outside the litigation for an "alien" or "collateral" purpose is not permitted without the consent of the affected party or an order of the court.
>
> (*Sovani v. Gray et al.; Jampolsky v. Shattler et al*., 2007 BCSC 403 at paras. 48-49).

Use in parallel or related proceedings is not permitted

The implied undertaking governs information disclosed in a proceeding and prevents it being used freely in other proceedings (i.e. proceedings with separate court file numbers) regardless of whether the subsequent or consecutive litigation between the same parties:

> Had the named defendants in the Current Action been, by some remarkable circumstance, the named defendants in the Earlier Actions, the evidence would not have been available to them (subject to the other arguments advanced by the defendants to make use of such information) without either the accedance of the plaintiff or an order of the court. Thus, for example, if a party makes disclosure in litigation against the Provincial or Federal Crown, it is not open to either of those parties to look to or make use of such disclosure in subsequent litigation involving those same parties. The implied undertaking rule extends to subsequent or consecutive litigation between the same parties.
> …
> 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.
>
> (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at paras. 21 and 25).

The court in *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 held that listing a document on a list of document was a "use" of the document and so a violation of the implied undertaking: para. 49-52. However, the fact that the listing party has possession of documents subject to an implied undertaking should be indicated in the privileged section of the list of documents:

> I believe that it would be appropriate for a party, from whom document disclosure is sought, to list those documents in its possession which are subject to an implied undertaking under part 3 of its list of documents.
> (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 41).

The requirement to list documents subject to the implied undertaking in the privileged section of the list of documents is to put the opposing parties on notice that the documents are in the listing party's possession so that the party receiving the list can apply for court order permitting disclosure of the documents even if the listing party would prefer that they not be fully disclosed in the current proceeding. Note that in addition to faulting the defendants for listing documents originally obtained from the plaintiff and still subject to an implied undertaking, the court in *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 held that the plaintiff was required to list the documents on her list of documents:

> The plaintiff concedes that the implied undertaking rule does not in any way shield her from her obligation to produce documents in her possession. The fact that the plaintiff considered that the defendants had acted improperly in using documents arising from the Earlier Actions did not constitute justification for holding her own obligations in abeyance. She was required to produce all relevant materials in her possession in accordance with Rule 26.

> (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 54).

In the case of parallel and related proceedings, counsel should not assume that the other parties agree to share and use information across proceedings. Rather, the consent of all parties to use all information in all proceedings, or a court order permitting such use, should be obtained.

Common situations of parallel and related proceedings occur where personal injury plaintiffs bring separate actions arising out of different motor vehicle accidents, or bring tort and Part 7 actions.

In *Holman v. Nguyen*, 2000 BCSC 1915 a plaintiff brought successive claims arising out of two motor vehicle accidents. The examination for discovery report prepared by defence counsel in the first action was shared with defence counsel in the second action. The court held this to be a breach of the implied undertaking and to ensure fairness to the plaintiff ordered disclosure of the original discovery report to the plaintiff; see discussion in remedies section below.

COLLATERAL USE PERMITTED BY CONSENT

Collateral use may be made with consent

In *Juman v. Doucette*, 2008 SCC 8 the Supreme Court of Canada confirmed that the owner of the information subject to the implied undertaking can consent to collateral use of the information covered by the undertaking:

> [W]here the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 30).

Consent must be sought even from named parties even if not parties of record

In *I.C.B.C. v. Titanich*, 2010 BCSC 403 ICBC sued Mr. Titanich to recover damages which ICBC had paid to the plaintiff on account of an accident caused by Mr. Titanich while he was impaired by alcohol. Mr. Titanich did not file an appearance in the claim by the plaintiff, but ICBC defended the claim and in the process obtained production of records from the RCMP. Mr. Titanich then complained when ICBC used those in the subsequent debt recovery action against him. ICBC argued that it was not required to seek Mr. Titanich's consent to the use of the materials, because, having not filed an appearance, Mr. Titanich was not a party to the earlier litigation. The court rejected that argument:

> The plaintiff argues that it was not in breach of the implied undertaking because it was not required to obtain Mr. Titanich's consent because he was not a party of record in the earlier action. I am not persuaded that there is merit in that position. Such an approach would not serve the purpose of the undertaking. To illustrate, Mr. Titanich was examined for discovery in the earlier action. If the plaintiff's position is correct then it would be able to use that discovery evidence in this or any action without obtaining Mr. Titanich's consent because he was not a party of record. The implications for the object of the exercise are obvious.
> (*I.C.B.C. v. Titanich*, 2010 BCSC 403 at para. 16).

Consent should generally be granted in personal injury cases

In *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 the court confirmed that consent to use of documents from previous personal injury cases should usually be granted in subsequent personal injury cases:

> The practical consequences of these restrictions, it will be seen, are in most cases minimal. In most cases where ICBC or its counsel is aware, through the pleadings or their direct involvement in earlier litigation, of relevant documents or other pretrial discovery from that litigation, they need only contact plaintiff's counsel to obtain his or her concurrence to the use of the materials in question. Overwhelmingly, having regard to the authorities to which I will refer, that concurrence should be forthcoming.
> (*Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 26).

COLLATERAL USE PERMITTED BY COURT ORDER

Court order must be sought in the absence of consent

If the party that disclosed the information subject to an implied undertaking does not consent to subsequent use of the information in other proceedings, the proper course is to apply for a court order permitting such use:

> Here, if the parents of the victim or other party wished to disclose the appellant's transcript to the police, he or she or they could have made an application to the B.C. Supreme Court for permission to make disclosure…
> (*Juman v. Doucette*, 2008 SCC 8 at para. 5).

See also *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 at para. 62.

Subsequent use will generally be permitted where subsequent litigation involves similar parties and issues:

> 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.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 35).

Thus, a party that wishes to use documents subject to an implied undertaking should first request permission and then, if such consent is not forthcoming, apply for a court order permitting the desired use. Parties who unreasonably refuse to consent to reasonable use may be required to pay the costs of the court application.

In *Juman v. Doucette,* 2008 SCC 8 the importance of requiring consent, or a court order, before disclosure to policing authorities was explained as follows:

> [P]arties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police might achieve, and to pose questions to the examinee

> to lay the basis for such an approach… The rules of discovery were not intended to constitute litigants as private attorneys general.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 43).

Binnie J. explained how courts would be able to balance the public and private interests in each case to determine whether disclosure of the discovery information to the police would be justified in each case:

> [On an application for disclosure] the court will be able to weigh against the examinee's privacy interest the seriousness of the offence alleged, the "evidence" or admissions said to be revealed in the discovery process, the use to which the applicant or police may put this material, whether there is evidence of malice or spite on the part of the applicant, and such other factors as appear to the court to be relevant to the exercise of its discretion. This will include recognition of the potential adverse effects if the protection of the implied undertaking is seen to be diluted or diminished.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 44).

Urgency or inconvenience will not excuse need for court application

Counsel should be wary of considering inconvenience or urgency as justification for not seeking the courts permission:

> Counsel for the plaintiff chose to use the information in the expert's report to frame, in part, a new proceeding rather than apply for leave because, according to him, the limitation period might have expired before defendants' counsel was available for a Chambers application. Yet the application could have been brought on short notice, with leave, or perhaps even without notice as the undertaking is owed to the court rather than the opposing party.
> (*Professional Components Ltd. v. Rigollet*, 2010 BCSC 688 at para. 23).

Similarly, the fact that the court would likely grant permission is not a sufficient basis for proceeding without consent or court order:

> Nor am I minded to create an exception to the rule to permit procedural "shortcuts". If it is clear that the Court's consent would have been given had it been sought, then it simply should have been sought.
> (*Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453 at para. 15).

Standing to apply for relief from implied undertakings

Non-parties to the implied undertakings may apply for permission to use discovery information for a collateral purpose. Whether such application will succeed will depend on the circumstances:

> [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.
> (*Juman v. Doucette*, 2008 SCC 8 at para. 53).

Application for relief from implied undertaking may be made ex parte

Where it is feared that the person alleged to have committed the crime may destroy evidence if notified of the application for permission to disclose the discovery information to the police, the application may be brought *ex parte*: *Juman v. Doucette*, 2008 SCC 8 at para. 50.

Proper parties to court application to vary implied undertaking

Generally, the issue of who should be given notice of applications for permission to make collateral use of discovery information will be dealt with by the judge before whom the application is brought. However, in *Juman v. Doucette*, 2008 SCC 8 at para. 52, Binnie J. stated that generally neither the police nor the media will be entitled to notice.

In *Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 it was held that only the disclosing party and the receiving party were necessary parties to the application to vary the implied undertaking and that other "interested" parties need not be given notice:

> The only parties with an interest in the implied undertaking in this case are the parties who produced the documents at issue and the court itself. This is because the undertaking is an undertaking to the court, based on policies that serve to promote full discovery by the parties to the action. The party that produced the documents on discovery, the court, and the party seeking leave are the interested parties. These are the parties present on this application.
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 50).

Test for court order permitting collateral use

The Court in *Juman v. Doucette*, 2008 SCC 8 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 or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 32).

Thus, the competing interests must be considered on a case by case basis. Where the interests counting against disclosure are substantial, such as the right against self incrimination (as was the case in *Juman*), court ordered modification of the implied undertaking will only be granted in

rare circumstances. But such cases will occur, just as exceptions will be made to legal advice privilege in certain circumstances:

> If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, [1999] 1 S.C.R. 455 it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 33).

However, in cases where the interests counting against disclosure are less compelling, modification of the implied undertaking may be ordered more frequently:

> [W]here 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.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 35).

> In my opinion the onus of establishing special reasons under Rule 27(25) is not a heavy one; an order for production of a discovery transcript from another action should be almost automatic, provided it is established that there is sufficient connection between the two actions, by the parties, their interests and the broad issues between them, so that it can be said that the actions are related. The overall question is whether the evidence given by the witness at discovery in the earlier action, may have some bearing or relevance, directly or indirectly, on the evidence he may give in the second action. Any doubt in this regard, in my view, should be resolved in favour or the applicant, provided there is no evidence that substantial detriment or injustice will be done to the witness, and which in most cases will be unlikely. Even then restrictions on the use of the transcript in most cases should reduce any detriment or injustice to the witness, to the extent that the balancing of the competing interests will come down in favour or the party seeking to use the transcript.
> (*Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.*, 1998 CanLII 5684 at para. 20 (B.C.S.C.)).

Examples of court permitted collateral use of civil discovery

Collateral use of civil discovery for criminal prosecution

In *Juman v. Doucette*, 2008 SCC 8 the Supreme Court of Canada considered the circumstances in which information covered by an implied undertaking may be disclosed on the grounds that it provides evidence of past criminal conduct. In *Juman* a childcare worker was sued after a child her in care suffered a brain injury and the police sought access to the childcare worker's examination for discovery evidence. The Court held that the allowing the police to take advantage of the statutorily compelled testimony in the civil litigation in that case would undermine the childcare worker's constitutional right to silence and right against self-incrimination, and so refused to allow the collateral use.

> The purpose of the application [for the discovery transcript by the Attorney General] was to sidestep the appellant's silence in the face of police investigation of her conduct. The authorities should not be able to obtain indirectly a transcript

> which they are unable to obtain directly through a search warrant in the ordinary way because they lack the grounds to justify it.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 58).

In the earlier case of *Tyler v. M.N.R.*, [1991] 2 F.C. 68 (C.A.) the Canada Revenue Agency (CRA) learned that Mr. Tyler had been charged with narcotics offences and suspected that he had not reported the profits from his drug business for tax purposes. CRA re-assessed Mr. Tyler's tax returns and then obtained statutorily compelled information from Mr. Tyler during discovery in the tax litigation that ensued. The RCMP wanted access to that discovery information to use in the criminal proceedings still underway. Noting that Mr. Tyler was statutorily compelled to provide information on discovery, the Federal Court of Appeal refused to permit CRA to share the information it had obtained with the RCMP. Stone J.A., writing for a unanimous Federal Court of Appeal, held that the prosecution of crime did not, in that case, trump Mr. Tyler's privacy interest in the disclosure of statutorily compelled information. The Supreme Court of Canada approved of this result in *Juman v. Doucette,* 2008 SCC 8 at para. 48).

In *Fraser City Motors Ltd. v. Moore*, 2010 BCSC 146 the defendant admitted to committing fraud on the plaintiff by falsifying motor vehicle VIN numbers in a motor dealership business. The court refused the plaintiff's application for an order allowing disclosure of the defendant's discovery transcript (in which he admitted the fraud) to the police:

> In this case, the public interest in the pursuit of crime does not trump Mr. Moore's right to silence and the protection against self-incrimination afforded him by the criminal law. There is no immediate and serious danger that would justify avoiding the requirement that the plaintiff apply for a court order for release of the transcripts to the RCMP. The plaintiff has in good faith applied for the transcripts after having made a complaint to the RCMP. However, in all the circumstances, I exercise my discretion to refuse the application because this is not one of those extraordinary cases that justifies overriding the public interest in maintaining the implied undertaking that protects the values and benefits of a proper pre-trial discovery.
> (*Fraser City Motors Ltd. v. Moore*, 2010 BCSC 146 at para. 89).

Use of medical report in related proceeding

In *Joubarne v. Sandes*, 2008 BCSC 1542 Master Caldwell held that a medical report from a previous wrongful dismissal proceeding could not be used in a subsequent motor vehicle accident claim, but on appeal Williams J. held that the implied undertaking should be varied to allow use of the report in the subsequent action. The report was relevant to the motor vehicle accident claim because it dealt with issues including employment history, fitness and performance, and health issues:

> In the present case, the discoveree is the plaintiff. Furthermore, the claim in the employment litigation encompassed issues including her employment history, fitness and performance in her employment, as well as health issues that may have impacted on her performance. In the present action, the plaintiff advances claims for loss of earnings and loss of capacity. She alleges that the accident resulted in her developing a driving anxiety and depression as well as loss of enjoyment of life and permanent physical disability. There is, as well, a temporal proximity.

> In my view, it is reasonable to conclude that the examination for discovery transcript in the earlier proceeding is likely relevant to the issues in the personal injury action. Furthermore, in the circumstances, there is no bar at law to preclude those materials from production and the court has a discretion to relieve against the implied undertaking and to order disclosure.
>
> (*Joubarne v. Sandes*, 2009 BCSC 1413 at paras. 25-26).

Collateral use may not be permitted for defamation action

In *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (Ont. C.A.) a plaintiff in a wrongful dismissal action received documents on discovery which she considered to be defamatory. The plaintiff initiated a defamation action based on the documents received on discovery, but the Ontario Court of Appeal granted the defendant a stay of proceedings because in that case it would have been unfairly prejudicial to the defendant to allow the plaintiff to base the defamation action on documents that she, nor hardly anyone else, would have seen but for the discovery in the wrongful dismissal action.

Use to impeaching inconsistent testimony in subsequent proceeding

Where a deponent gives contradictory testimony about the same matter in successive proceedings, the evidence from the earlier proceeding (including an examination for discovery) may be used to impeach the testimony of the deponent.

In *Abernethy v. Ross* 1985 CanLII 550 (B.C.C.A.) the court held that it was proper for the transcripts of the defendants' examinations for discovery from a previous action to be used to cross-examine them in the current action which was based on the same facts.

In *Juman v. Doucette,* 2008 SCC 8 Binnie J. explained the right to make such use of discovery evidence is a rule of common law which is needed to restrict deponents from tailoring their testimony to suit their interests in each proceeding:

> An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 41).

In *Hoffman v. Percheson*, 2008 BCSC 1267, a foreclosure proceeding, the court permitted a discovery transcript from the defendant's earlier divorce proceeding to be admitted where it would assist the court in resolving credibility issues:

> This case turns on credibility issues. Mr. Percheson alleges that for 10 years he has paid, or has had paid on his behalf in addition to interest called for under the mortgage, an additional $1,400 per month. He alleges those payments were made in cash. Mr. Hoffman denies receiving any such payments. Evidence given by Mr. Percheson concerning these mortgages in a prior proceeding may assist in resolving the conflicting evidence. Although the evidence was given in a wholly unrelated proceeding, the interest of justice dictates that Mr. Percheson's sworn evidence in the earlier proceeding be admitted. His prior statements may assist the court in determining his veracity and trustworthiness. In the circumstances of this case, I grant leave to Mr. Hoffman to use Mr. Percheson's discovery

> transcript. Use of the transcript is limited, however, to the portions of that transcript which relate to the Warehouse Property and mortgages placed on it. (*Hoffman v. Percheson*, 2008 BCSC 1267 at para. 20).

In *Siebert v. Spitters*, 2009 BCSC 1307 information from the defendant's earlier divorce proceeding was ordered producible in a subsequent divorce proceeding because there were discrepancies between what the defendant said or swore to in the two proceedings.

Use of prior examination for discovery transcript for general discovery

In *Khela v. Sidhu*, 2004 BCSC 971, a family compensation action, Brooke J. ordered that a transcript from the examination for discovery of the plaintiff's late husband in a separate action be produced. The production was opposed on the basis that the actions related to different persons and different losses. The court referenced the *Peruvian Guano* test and concluded that the transcript could contain information which may lead to a train of enquiry which could advance the applicant's case or damage that of the respondent.

In *Beazley v. Suzuki Motor Corporation*, 2008 BCSC 850 aff'd 2009 BCCA 57 transcripts from American proceedings were found relevant and ordered to be listed in that motor vehicle products liability case. The chambers judge dealt with the transcripts issue using relevance principles and said that where the documents from other proceedings are clearly relevant the implied undertaking will generally not limit production.

However, evidence supporting the application must meet a minimum threshold. In *Biehl v. Strang*, 2009 BCSC 535 the plaintiff's in debt recovery action sought production of examination for discovery transcripts from a matrimonial action involving two of the defendants. In refusing the application and distinguishing *Hoffman v. Percheson*, 2008 BCSC 1267 Master Scarth held that the plaintiff had not presented sufficient evidence to establish that the transcripts sought would be relevant:

> In *Hoffman*, the petitioner had obtained a copy of the respondent's discovery in the divorce action, and the court concluded that a compelling interest had been established in that the respondent's discovery evidence conflicted with evidence he had given in the foreclosure proceeding by way of affidavit…
>
> I accept the submission of the defendants that the evidentiary foundation for making the order sought that was present in *Hoffman*, is not present here. The plaintiff seeks to rely on the public interest in the efficient conduct of this action. In my view, applying the principles in *Juman*, this does not amount to a compelling interest which would warrant setting aside the undertaking and requiring production of the transcripts or any portion of them.
>
> (*Biehl v. Strang*, 2009 BCSC 535 at para. 13-14).

COLLATERAL USE WITHOUT CONSENT OR COURT ORDER

The Court in *Hunt v. Atlas Turner Inc.* (1995), 4 B.C.L.R. (3d) 110 at para. 65 (C.A.) said that the implied undertaking should "not be construed rigidly and in a way that curtails other legal, social, or moral duties. For example, the implied undertaking may not prevent a lawyer from fulfilling his or her duty to report fraud or professional misconduct disclosed in the discovery process: *Hunt v. Atlas Turner Inc.* (1995), 4 B.C.L.R. (3d) 110 at para. 65 (C.A.)).

In *Juman v. Doucette*, 2008 SCC 8 the Supreme Court of Canada explained that in emergency situations a party may be justified in disclosing information about future crimes to the police without a court order:

> [I]f, as discussed in [*Smith v. Jones*, [1999] 1 S.C.R. 455, which considered the public safety exception to solicitor-client privilege] 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.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 40).

However, given the serious consequences that may be imposed for breach of the implied undertaking, counsel should proceed cautiously and seek court direction in the case of uncertainty.

EXPIRATION OF THE IMPLIED UNDERTAKING

Rationale for termination of the undertaking upon disclosure in court
Since the purpose of the implied undertaking is to protect the confidentiality of information, it is arguable that once the documents and information have been made public in court proceedings the undertaking should end because there is no confidentiality left to protect.

That principle has been codified in some provides. For example, Rule 30.1.01(5) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides as follows:

> (5) Subrule (3) does not prohibit the use, for any purpose, of,
> (a) evidence that is filed with the court;
> (b) evidence that is given or referred to during a hearing;
> (c) information obtained from evidence referred to in clause (a) or (b).

However, in provinces without codification the implied undertaking rule, expiration of the undertaking is governed by the common law.

If the case settles, the implied undertaking prevails in full
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 the settlement has rendered the discovery moot does not mean the [disclosing party's] privacy interest is also moot. The undertaking continues to bind.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 51).

To the extent information is disclosed at trial, the undertaking is reduced
The implied undertaking of confidentiality generally expires when information subject to the undertaking is disclosed at trial:

> If the adverse party chooses to use the evidence or information obtained on discovery at the hearing on the merits and files it in the court record for that purpose, any expectation of confidentiality disappears. Only exceptional grounds

> such as, for example, the interest of one party in protecting trade secrets or specially privileged information, such as professional privilege or *in camera* hearings concerning individuals' conditions, will result in the court maintaining the partial or complete secrecy of certain information, during the trial and in the court records.
> (*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51 at para. 43).

The implied undertaking continues with respect to information that is not disclosed at trial

> 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.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 51).

> It is now clear that a litigant's obligation of confidentiality respecting documents obtained on discovery comes to an end at the time a document is entered in evidence at the trial, unless there is an agreement between the parties or a court order to the contrary.
> (*International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2008 BCSC 1009 at para. 28).

In *International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2008 BCSC 1009 Halfyard J. held that sensitive business information should continue to be governed by the implied undertaking despite it having been disclosed at trial:

> The undertaking not to use the documents obtained on discovery except in the civil proceedings in which the documents were obtained, is an undertaking to the court… The court has the inherent power to control its own process... This discretion must of course be exercised judicially.
>
> In the particular and unusual circumstances of this case, it is my opinion that it would best serve the interests of justice if the undertaking of confidentiality given by the parties and their lawyers to the court should survive the trial, even with respect to documents that were entered as exhibits at the trial, and I so order.
>
> (*International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2008 BCSC 1009 at para. 35-36).

However, that decision was overturned on appeal. The fact that the party seeking continuation of the implied undertaking (the plaintiff union) had been the one to disclose them at trail counted against the undertaking continuing, but the British Columbia Court of Appeal held that the undertaking would have expired in any event:

> [H]ere, the Union elected to make the Documents public and cannot be said to be prejudiced if the defendants, like any other member of the public, use them for other purposes. The fact the Union disclosed the Documents prior to trial does not, in my respectful view, alter this fact. What happened in the discovery room is superseded by what the Union did in the courtroom.

> …Furthermore, even if the defendants had entered the Documents into evidence, the obligation would have terminated at that time in accordance with the law reviewed above.
>
> (*International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2009 BCCA 355 at para. 28-29).

Implied undertaking survives limited disclosure in chambers applications

Courts have indicated that parties should not be able to relieve themselves of the implied undertaking by simply filing discovery transcripts in interlocutory proceedings. In *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, (1997) 42 B.C.L.R. (3d) 192 (S.C.) Ebco had received various documents and then disclosed them to a third party. Ebco argued that disclosure of many of the documents was justified on the basis that they had previously been made public in court proceedings when they were attached to an affidavit filed in a chambers motion. Williams C.J.S.C. held that the implied undertaking does not necessarily end just because the materials have been disclosed in court:

> From a practical point of view one has to ask whether a receiving party should be able to avoid the implied undertaking by simply filing an affidavit with the documents in some interlocutory matter in Court? I think not.
> (*Discovery Enterprises Inc. v. Ebco Industries Ltd.*, (1997) 42 B.C.L.R. (3d) 192 at para. 29(S.C.)).
>
> Should disclosure in a chambers application, filing in a public registry or even disclosure in open court, all of which are extremely limited disclosures, be a rationale for ending an implied undertaking which came about to protect the disclosing party from those documents being used for extraneous purposes?
> (*Discovery Enterprises Inc. v. Ebco Industries Ltd.*, (1997) 42 B.C.L.R. (3d) 192 at para. 34 (S.C.)).

Williams C.J.S.C. held that if the law was to be changed such that disclosure in court was to end the implied undertaking of confidentiality, that change should be made by the Rules Revision Committee. Accordingly, Williams C.J.S.C. ordered that no further disclosure could lawfully be made by Ebco even with respect to the documents that had been attached to the affidavit filed in court. Ebco applied for leave to appeal to the British Columbia Court of Appeal, but leave was refused: *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 1998 CanLII 6472 (B.C.C.A.). Newbury J.A. agreed with Williams C.J.S.C. that such change to the law should be left to the Rules Revision Committee. Newbury J.A. noted that Williams C.J.S.C. concluded that the weight of authority was in favour of the continued applicability of the implied undertaking despite disclosure in court, but acknowledged that courts were divided on this issue:

> The Chambers judge in the case at bar also noted the decision of the Federal Court of Appeal in *Lubrizol v. Imperial Oil Ltd.* (1990) 41 F.T.R. 234, the decision of the Alberta Queen's Bench in *Wirth Ltd. v. Acadia Pipe & Supply Corp.* (1991), 79 Alta. L.R. (2d) 345, and the decision of the Nova Scotia Court of Appeal in *Sezerman v. Youle* (1996), 135 D.L.R. (4th) 266. In all three, the court found that the implied undertaking continued notwithstanding disclosure of the documents in court proceedings. On the other hand, the Ontario Court of Appeal in dicta in *Goodman v. Rossi* (1995) 125 D.L.R. (4th) 613, suggested that the "rule" (i.e., the

> implied undertaking against disclosure) should cease to apply once the documents in question had been read out in open court.
> (*Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 1998 CanLII 6472 at para. 4 (B.C.C.A.)).

In *Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 Madam Justice Griffin described procedural differences between evidence adduced at trial and information attached to affidavits filed in interlocutory proceedings as follows:

> 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.
>
> 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…
>
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 27 - 28).

Following a detailed consideration of the various issues at play, Madam Justice Griffin went on to formulate the following rules governing the implied undertaking and materials filed in interlocutory proceedings:

> (a) the implied undertaking does not end when information, produced by an adverse party under compulsion of discovery (the "Producing Party"), is filed in court by the receiving party (the "Receiving Party") in support of an interim application;
> (b) in considering a Receiving Party's application for leave to be relieved from the implied undertaking, 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; and
> (c) the implied undertaking of a Receiving Party ends, with respect to information produced by the Producing Party, when that information is filed in court by the Producing Party itself.
> (*Bodnar v. The Cash Store Inc.*, 2010 BCSC 660 at para. 45).

The foregoing indicates that the mere fact that information is publicly available in the court registry does not automatically relieve the receiving party from its implied undertaking.

CONSEQUENCES FOR BREACH OF THE IMPLIED UNDERTAKING

Variety of remedies available for breach of the implied undertaking

Breach of the implied undertaking is punishable by contempt of court, but courts may apply other remedies, such as prohibiting use of the information in question, or even staying an action that has been commenced based on information protected by the undertaking:

> [D]epending 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.
> (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.)).

In *Juman v. Doucette*, 2008 SCC 8 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.
> (*Juman v. Doucette,* 2008 SCC 8 at para. 29).

Contempt of court

The traditional common law approach is that breach of an implied undertaking constitutes contempt of court: *Sandbar Construction Ltd. v. Howon Industries Ltd.* (1998) 58 B.C.L.R. (3d) 55 (S.C.); *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc*., 2001 SCC 51; *Home Office v. Harman*, [1983] 1 A.C. 280 (H.L.); *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355 (Gen. Div.); *Orfus Realty v. D.G. Jewellery of Canada Ltd.* (1995), 24 O.R. (3d) 379 (C.A.).

In *Sandbar Construction Ltd. v. Howon Industries Ltd.* (1998), 58 B.C.L.R. (3d) 55 (S.C.) the court applied the contempt remedy to the breach of the implied undertaking.

Removal of counsel from record

In *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474 the court rejected the plaintiff application (para. 57) to have defence counsel removed from the record because although the court found that there had been a breach of the implied undertaking, "Counsel for the defendants acted cautiously, and for the most part, properly": para. 58.

Claim may be struck out

Authority to strike claim out

In British Columbia the power to strike an action for breach of the implied undertaking arises from the inherent jurisdiction of the court:

> [I]t 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.
> (*Professional Components Ltd. v. Rigollet*, 2010 BCSC 688 at para. 33).

Cases considering applications to strike claims

In *Glenayre Manufacturing Ltd. v. Pilot Pacific Properties Inc*., 2004 BCSC 864 the plaintiff used documents subject to the implied undertaking as the basis for a second action. The court struck out the writ of summons and the statement of claim in the second action, but found that it was just and convenient to join the defendant named in the second action as a party to the first action.

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 their implied undertaking. The court reprimanded the plaintiff for breaching the implied undertaking, but allowed the second action to continue:

> 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.
>
> 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.
>
> (*Professional Components Ltd. v. Rigollet*, 2010 BCSC at para. 55 – 56).

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.

Prohibition on use of documents

In *Litton v. Braithwaite*, 2006 BCSC 1481 the court prohibited the plaintiff from using documents in contravention of its implied undertaking of confidentiality.

Compelled disclosure of strategy information.

In *Holman v. Nguyen*, 2000 BCSC 1915 the court ordered disclosure of an examination for discovery report which had been shared in violation of the implied undertaking. In that case the plaintiff brought successive claims arising out of two motor vehicle accidents. The examination for discovery report prepared by defence counsel in the first action was shared with defence counsel in the second action. The court held that there was no common interest between the successive defendants and that the common interest exception to waiver of solicitor client privilege exception did not apply, and so ordered production of the discovery report which had been listed on the defendants list of documents in the second action. The court held that the plaintiff was also entitled to disclosure of that report on the basis that providing that report to counsel in the section action was a breach of the implied undertaking with respect to the information disclosed in the first action:

> There is another reason that I am ordering production of this document. There is authority that examination for discovery of a party in one action cannot be used in another action without the party's consent or court order: *Edgeworth Construction Ltd. v. Thurber Consultants Ltd*. (1996), 18 B.C.L.R. (3d) 127 at 131 (S.C.). The plaintiff deposes that she did not authorize ICBC to access documents in its possession or that of anyone else except in respect of the July 15, 1999 accident. I understand that the document in question reports on the examination for discovery of the plaintiff in the prior action. It appears that the disclosure by ICBC of this document may be contrary to the authority that would restrict the use in this action of examination for discovery of the plaintiff in the prior action. In my view, fairness requires that since the document has been disclosed to the defendant, the plaintiff have access to it as well.
> (*Holman v. Nguyen*, 2000 BCSC 1915 at para. 7).

Breach of the implied undertaking is not a tort

Breach of an implied undertaking may be tortious if it meets the requirements of a tort such as breach of confidence but mere breach of the implied undertaking is not in and of itself a tort:

> The undertaking is not a contract or a promise to an opposite party, but rather an obligation to the court. A breach of the undertaking is dealt with by the court within the context of the lawsuit in which the breach occurs. Typically a breach of the undertaking will be dealt with as a contempt of court. It may be that other remedies are possible; I do not express any conclusion on that. What is clear, however, is that the breach does not in and of itself create a private law cause of action.
> (*McDaniel v. McDaniel*, 2008 BCSC 653 at para. 33).

CROWN DISCLOSURE IN CRIMINAL PROCEEDINGS

Express undertaking imposed by Crown not binding

The Crown is required to make full disclosure of all relevant information to accuseds in criminal proceedings: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. When making such disclosure the Crown generally imposes, in writing, an express requirement that the materials disclosed are not to be used for any other purpose. However, in *Huang v. Sadler*, 2006 BCSC 559 Dillon J. held that the express undertaking imposed by the Crown is not be effective in all circumstances:

> The Crown cannot limit use of Crown disclosure documents for all purposes when a party is under a legal obligation to produce documents, when interests of fairness and justice in civil proceedings require disclosure, and when state and third party interests can be adequately protected through the implied undertaking rule in civil proceedings or through confidentiality conditions attached to a production order, if necessary.
> (*Huang v. Sadler*, 2006 BCSC 559 at para. 16).

Court order or consent required for use of criminal disclosure materials in civil proceedings

In *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.) the Ontario Court of Appeal explained that it is difficult to enunciate a simple rule regarding what use can be made in civil proceedings of Crown disclosure materials, but declined to decide whether such materials were covered by an implied undertaking:

> [I]t is not, strictly speaking, necessary to decide in this case whether there is an implied undertaking rule applicable to Crown disclosure. While it would seem to me that there are compelling reasons for recognizing such a rule, we did not have complete argument on the issue….I am therefore reluctant to lay down a rule in this case that could have important practical consequences in other types of litigation. Suffice it to say, the compelling reasons for possibly recognizing an implied undertaking rule justify the adoption of the screening process where the Crown brief, for whatever reason, finds its way into the hands of a party in a civil case.
> (*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 47 (C.A.)).

The court in *Wagg* preferred a screening procedure to determine whether Crown disclosure provided to an defendant in criminal proceedings should be disclosable in civil proceedings, and endorsed the following screening process (see para. 17):

- The party in possession or control of the *Stinchcombe* materials must disclose their existence in the party's affidavit of documents and describe in general terms the nature of their contents.
- The party in possession or control of the *Stinchcombe* materials should object to production of those materials until the appropriate state authorities have been notified, namely the Attorney General and the relevant police service, and either those agencies and the parties have consented to production, or, on notice to the Attorney General and the police service and the parties, the court has determined whether any or all of the contents should be produced.
- The judge hearing the motion for production will consider whether some of the documents are subject to privilege or public interest immunity and generally whether there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information.

As is the case for implied undertakings, consent to the use of *Stinchcombe* materials in civil proceedings obviates the need for a court order:

> If the relevant police service and the Attorney General consent to production, then there is no need for a court order…If the police or the Crown are concerned that third party interests in the particular case are not adequately protected, they can give notice to that party and refuse to consent. There may also be cases where an order is appropriate because the Attorney General or the police seek to impose conditions on the use of the documents and the parties cannot agree on those conditions. In those cases, which would probably be rare, the court will then make the final determination.
> (*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 79 (Ont. C.A.)).

In *Huang v. Sadler*, 2006 BCSC 559 Dillon J. endorsed the screening process set out in *Wagg*:

> I agree that the balancing of interests required prior to production of these documents requires a screening mechanism similar to the process adopted in *Wagg*. Where production of Crown disclosure documents is sought, the police and prosecuting authority must be notified and their consent sought. There is no need for intervention of the court if such consent is obtained. As accepted in

> *Wagg* at para.81, in most cases, the undertaking that applies in all civil cases will be sufficient protection against improper use of the material. However, in some cases and where consent is not obtained, an application under Rule 26(11) [of the British Columbia *Rules of Court*, B.C. Reg. 221/90] will be required.
>
> If the matter comes for hearing, the balancing test… described in *Wagg* at para. 17 should be considered. The judge should ask whether some of the documents are privileged and generally whether there is a prevailing social value and public interest in non-disclosure in the particular case that overrides the public interest in promotion of the administration of justice through full access of all parties to relevant information.
>
> (*Huang v. Sadler*, 2006 BCSC 559 at paras. 18-19).

Thus, civil litigants wishing to use criminal disclosure materials in civil litigation should seek consent from the police, Crown, and opposing civil litigants, or obtain a court order, permitting such use.

Crown disclosure materials generally producible in civil proceeding

In *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.) the Ontario Court of Appeal said that fairness will often require that Crown disclosure materials in the hands of one civil litigant will have to be disclosed to the opposing civil litigants:

> Where the party in possession of the Crown brief has access to the materials, fairness will generally dictate that they be produced to the other side.
> (*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 51 (C.A.)).
>
> "The 'fruits of the investigation' in the possession of the Crown 'are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done' ". Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court. The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.
> (*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 53 (C.A.)).
>
> If the defendant's statement is potentially admissible at [the civil] trial, it should be subject to production.
> (*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 71 (C.A.)).

Production of Crown disclosure materials was ordered in the case of *Huang v. Sadler*, 2006 BCSC 559. In that an elderly women standing at a bus stop was injured when she was struck by an ambulance. Before striking the plaintiff the ambulance had been struck by a vehicle driven by the defendant Sadler. The Vancouver Police Department investigated the accident and certain of the defendants were charged criminally. Dillon J. held that the documents disclosed to the defendants by the Crown should be listed on their list of documents and produced to the plaintiff in the civil action, and that all of the parties to the civil litigation could make use of them. Factors in favour of allowing use of the documents in that case included that the Crown did not identify specific third party privacy or other interests that should be protected, there was no suggestion that the Criminal investigation would be compromised by disclosure in the civil case, and

> In this case, fairness of the civil trial clearly overweighs any concern for the criminal proceedings when two defendants already have most of the material, the documents are relevant, and no specific interest is in need of protection through non-disclosure.
> (*Huang v. Sadler*, 2006 BCSC 559 at para. 20).

The court found that in that case any concern about witness tainting through exposure to other witness statements could be met through strict confidentiality conditions: *Huang v. Sadler*, 2006 BCSC 559 at para. 16. Dillon J. ordered that Counsel and the parties in the civil case take all reasonable steps to ensure that potential witnesses in the criminal trial were not exposed to other witness statements.

In *N.G. v. Upper Canada College* (2004), 70 O.R. (3d) 312 (Ont. C.A) the plaintiff alleged sexual assault by a school teacher and sued the teacher, and the school for negligence, breach of fiduciary duty, vicarious liability and occupier's liability. The allegations also led to criminal charges against the teacher and shortly after the arrest of the teacher the plaintiff gave the police a videotaped statement which was then disclosed to the teacher as part of the *Stinchcombe* disclosure materials. The school sought disclosure of the videotaped statement in the civil action and although the plaintiff consented to disclosure of the tape, the Crown opposed such disclosure on the basis that it may lead to irreparable harm through tainting of anticipated witnesses to the criminal proceeding. The Ontario Court of Appeal upheld the decision of the courts below that it would be unfair to require the school defendant to proceed to trial without the videotape, and that the public interest in preserving the integrity of the criminal proceedings could be met by an order limiting the uses the civil litigants could make of the tape, including that the parties were to take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to the contents of the videotape.

In *Wong v. Antunes*, 2008 BCSC 1739 the defendant was charged with criminal negligence causing death following a motor vehicle accident and the police collected evidence in the criminal investigation. The deceased's family commenced an action against the defendant and the court granted the plaintiff's application for an order for production of the police file materials:

> In sum, I can see no reason why, in the circumstances, the accused should be in a position to know of the police evidence or sources of evidence pertaining to the identity of the driver and the allegation of negligent operation of a motor vehicle, but the plaintiff who sues on behalf of the victim of the operator's negligence should not.
> (*Wong v. Antunes*, 2008 BCSC 1739 at para. 47).

In *Wong v. Antunes*, 2009 BCCA 278 the British Columbia Court of Appeal varied the terms of the order made by the chambers judge, but still required production of information collected by the police.

The foregoing indicates that civil litigants in possession of *Stinchcombe* disclosure materials should inform opposing parties of that fact and any party that wishes to review or use those materials in the civil proceeding should seek consent or a court order permitting such review and / or use. If Crown consent is not forthcoming the court will weigh the competing interests in deciding whether, and if so to what extent, use can be made of the *Stinchcombe* disclosure materials.

CONCLUSION

Counsel, and the clients for whom they act, are under an implied undertaking of confidentiality when they receive information disclosed under compulsion of the rules of court. Breach of the implied undertaking is a serious matter, and failure to abide by it may constitute contempt of court.

In all cases counsel should err on the side of caution, and seek consent or direction from the court in the event of uncertainty as to whether information is covered by an implied undertaking, or whether a particular use is permissible despite the information in question be covered by an implied undertaking.

These materials were prepared by Michael Dew of Jenkins Marzban Logan, LLP for the Continuing Legal Education Society of British Columbia, October, 2012.