



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Power v. Parsons*, 2018 NLCA 30

Date: May 10, 2018

Docket: 201501H0068

BETWEEN:

MICHAEL F. POWER

APPELLANT

AND:

JOHN PARSONS

FIRST RESPONDENT

AND:

THE VALES DEVELOPMENT INC.

SECOND RESPONDENT

AND:

INSTITUTE OF CHARTERED ACCOUNTANTS
OF NEWFOUNDLAND AND LABRADOR

THIRD RESPONDENT

Coram: Green C.J.N.L.*, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401G7913
(2015 NLTD(G) 87)

Appeal Heard: May 17, 2016

* Since the hearing of this appeal, Chief Justice Green has relinquished the office of Chief Justice and continues to sit as a supernumerary judge.

Judgment Rendered: May 10, 2018

Reasons for Judgment by: White J.A.

Concurring Reasons by: Hoegg J.A.

Concurring Reasons by: Green J.A.

Counsel for the Appellant: John Drover

Counsel for the First and Second Respondents: James J. Smyth Q.C.

Counsel for the Third Respondent: Augustine F. Bruce Q.C.

White J.A.:

BACKGROUND

[1] The appellant, Michael Power, is a chartered accountant who performed professional services for the second respondent, The Vales Development Inc., a company of which the first respondent, John Parsons, is a director. Mr. Parsons sued Mr. Power in relation to the accounting services he provided to Vales Development. In that litigation Mr. Parsons obtained documents from Mr. Power through the document discovery process. Mr. Parsons then turned those documents over to the third respondent, the Institute of Chartered Accountants of Newfoundland and Labrador (the “Institute”), in support of two complaints he made to this regulatory body about Mr. Power. He did not get leave of the court or Mr. Power’s permission to use these documents for this purpose.

[2] Mr. Power brought an application to the Supreme Court General Division, asserting that Mr. Parsons had breached an implied undertaking not to use information obtained through litigation for collateral purposes and asking the court to dismiss Mr. Parsons’ complaints made to the Institute or to prohibit the Institute from relying on the documents which were obtained in violation of the implied undertaking. He also sought to prevent those of the Institute’s investigators who had been working with the documents from continuing with his file. He sought the return of the documents and costs against Mr. Parsons and Vales Development.

[3] The applications judge denied Mr. Power’s application. While acknowledging that the implied undertaking rule is part of the law of Newfoundland and Labrador, he found that it did not assist Mr. Power in this

case. He concluded that the primary rationale for the implied undertaking rule was the protection of privacy and that an implied undertaking was unlikely to arise by operation of law if no privacy interest existed in the documents in question. He found that Mr. Power had no privacy interest in these documents because they were owned by Mr. Parsons and Vales Development or held by them independently of the disclosure process imposed by the civil action. He therefore dismissed Mr. Power's application, while emphasizing that Mr. Parsons should nonetheless have sought the guidance of the court before acting unilaterally to distribute the information.

[4] The applications judge also found that even if the breach of the implied undertaking had been made out, the *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1 grants the Institute the authority to seize the documents in question and thus overrides the implied undertaking rule. The remedy sought by Mr. Power, namely the stay of the Institute's proceedings, was therefore not available.

[5] Mr. Power appeals arguing that the applications judge misapplied the leading Supreme Court of Canada authority on implied undertakings, *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, and that the applications judge could and should have granted a stay of the Institute's proceedings.

STANDARD OF REVIEW

[6] The scope of the implied undertakings rule and the remedies for a breach are questions of law and thus reviewable on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8). I note that had the appeal been simply from a discretionary decision of the judge to grant or not grant relief from an already established implied undertaking, that decision would have been subject to deference.

ANALYSIS

[7] Mr. Power submits that the applications judge mistook the purposes of the implied undertaking rule as set out in *Juman*. He argues that the undertaking applies even when a privacy interest in the documents is not established and that third parties such as the Institute may run afoul of the undertaking by using the information if it is disclosed to them, even if they are otherwise empowered by statute to seize the information.

[8] In order to decide the issues, it is necessary to review the scope of the implied undertaking rule as established by the Supreme Court of Canada.

Concerning the purposes of the implied undertaking the Supreme Court of Canada in *Juman* stated:

[5] Here, because of the facts, much of the appellant's argument focused on her right to protection against self-incrimination, but the implied undertaking rule is broader than that. It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. ...

...

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

[26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. ...

[27] For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). ...

(Emphasis added.)

[9] At paragraph 23 of *Juman* the Supreme Court of Canada also noted a third rationale for the rule - in cases of "exceptional prejudice", such as cases concerning trade secrets or intellectual property which have traditionally given rise to express confidentiality orders, the implied undertaking rule also protects property rights.

[10] However, the implied undertaking rule:

- does not bind third parties (*Juman* at paragraph 55);
- “applies only to information that would have remained confidential if...discovery had not taken place” (*Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743 at paragraph 78);
- does not apply to information that may be obtained from other sources or is publicly available (*Lac d’Amiante* at paragraph 78);
- does not apply after the information has been introduced at trial, but continues to apply if the matter does not proceed to trial (*Juman* at paragraph 51; *Lac d’Amiante* at paragraph 70);
- does not mean documents subject to it are privileged. They are still subject to seizure through appropriate legal mechanisms (*Juman* at paragraphs 55-56);
- is subject to legislative override (*Juman* at paragraph 39);
- may be overridden by the court, on application (*Juman* at paragraph 30).

[11] **From the above, it appears that the applications judge erred when he found that the privacy interest is the only interest that is protected by the implied undertaking rule. Other rationales include the promotion of litigation efficiency and protection of property rights. It is important that the law create an incentive for parties to make full and frank disclosure even when there is objectively no privacy interest in the documents, since the parties may subjectively believe that the documents contain important information and be reluctant to disclose them. The fact that the appellant was not the owner of the documents is not, on its own, sufficient to displace any potential privacy interest or render the documents automatically available to the public.

[12] Nevertheless, I agree that to the extent that the respondents obtained the documents independently of the disclosure process in the civil action, the documents were not subject to the implied undertaking rule. However, the appellant has disputed the respondents’ entitlement to the documents and argues that in any event, the documents were not available to the public. Given the reasons which follow, I do not believe this issue needs to be finally determined in this appeal. It can be resolved by other decision makers in any subsequent proceedings regarding the admissibility of the evidence in the Institute’s complaints process.

[13] The appellant argues that even though *Juman* expressly states that implied undertakings do not bind third parties, third parties cannot seek to use information subject to an undertaking without the leave of the court, regardless of the manner in which the information was obtained. In support of this argument the appellant refers to the facts of *Juman*, which decided that parties to a settled lawsuit could not release transcripts obtained during the examination for discovery to the police to further a criminal investigation. The appellant also points to passages in *Juman* which suggest that third parties must apply for leave from the court before the undertaking will be lifted (see for example, paragraph 53).

[14] This position misconstrues the ruling in *Juman*. It is clear from *Juman* that an implied undertaking is a court-imposed legal obligation on “parties to civil litigation...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* at paragraph 27, emphasis added). The information subject to an implied undertaking is not privileged for that reason alone, and third parties are not bound by implied undertakings (*Juman* at paragraph 55). Third parties are not therefore bound to treat implied undertakings in the same manner as parties to litigation.

[15] However, the common law reveals a consensus that even though they are not bound by them, third parties are affected by implied undertakings and must respect them to some degree. The notion that third parties may be affected by orders by which they are not bound was accepted by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048. In that case the Court found that third parties who fail to respect court orders by which they are not bound may be found to be in contempt of court:

26 If third parties are not bound by an order, it would seem logically to follow that they cannot personally be held responsible for breaching it. Nevertheless, the English courts accept that non-parties may be held guilty of contempt for violating court orders. The House of Lords has recently confirmed that a person not named in an order may be held in contempt of court for doing the act prohibited by the order, even when acting independently and not aiding or abetting the named defendant: *Attorney-General v. Times Newspapers Ltd.*, [1991] 2 W.L.R. 994 (H.L.); see also *In re Supply of Ready Mixed Concrete*, [1991] 3 W.L.R. 707 (C.A.), at p. 718. In this sense, it may be argued that the English authorities, despite an apparent rule to the contrary, in fact hold that injunctions are binding on persons other than the parties to the action.

27 How is the fact that non-parties can be found guilty of violating court orders and sent to prison therefor to be reconciled with the assertion of the English authorities that only parties to the litigation can be bound by court orders? On the level of theory, these apparently contradictory positions are reconciled by the distinction between being bound by an injunction as a party to the action and being guilty of contempt of court by obstructing justice. Only parties are "bound" by the injunction. But anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court. ...

(Emphasis added.)

[16] For this reason third parties who are not involved in the proceedings yet want to access the information disclosed during discovery are required to apply for leave from the Court. Thus in *Juman*, the Attorney General (who could not otherwise get a search warrant to obtain the information by lawful means), had to apply for leave to attempt to get information from a party. Leave was denied. The Court, at paragraphs 36 and 53, also cited with approval a decision of the Superior Court of Ontario, *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (S.C.J.), which confirmed that third parties will rarely succeed on such leave applications:

[14] At common law, it appears that non-parties could seek relief from the undertaking but such relief was not readily granted. In "The Implied Undertaking in Ontario", by John B. Laskin, (1990) 11 Advocates' Q. 298, it is noted at p. 315:

Finally, it appears that the court will be less likely to grant leave where leave is sought by a non-party to the proceedings in which disclosure was made. In [*Home Office v. Harman*, [1983] 1 A.C. 280, [1982] 2 W.L.R. 338, [1982] 1 All E.R. 532 (H.L.)] Lord Roskill stated that he found it difficult to think of circumstances in which the court might be willing to grant leave "in favour of a stranger and against the wishes of the owner of the documents." In [*Bibby Bulk Carriers Ltd v Cansulex Ltd & Ors*, (1988) 2 All E.R. 820, (1989) Q.B. 155], the court refused to rule out the possibility of granting leave in those circumstances but stated that a non-party applicant bore a particularly heavy burden of showing cogent and persuasive reasons why leave should be granted. Most recently, in *Derby & Co. Ltd. v. Weldon*, [unreported, October 1988] the court stated that, on the authorities, leave to disclose to third parties to assist them in pursuing claims against the person who gave the discovery is "virtually never given".

[17] Nevertheless, this does not mean that any time a third party obtains or uses information which is subject to an implied undertaking, the third party will be sanctioned or prevented from relying on it. An implied undertaking

does not make the documents privileged (*Juman* at paragraph 56). Instead the implied undertaking exists to minimize the risk of prejudice which may be suffered by a person who is compelled to produce documents on discovery (*Lac d'Amiante* at paragraph 74). The purpose of the undertaking is not therefore, to prevent third parties from using the information (which is the purpose of privilege), but to impede access to information to which they may not otherwise be entitled and to prevent collateral use of the information thereby obstructing justice by creating a disincentive for parties to provide full and frank disclosure.

[18] Viewed from this perspective, third parties will only be in contempt of court if, by obtaining or using the information, they seek to frustrate the purposes of the implied undertaking. For example, a third party will be in contempt of court in obtaining the information if this is done by inducing those parties that are bound by the implied undertaking to breach it. On the other hand, “[t]he obligation of confidentiality applies only to information that would have remained confidential if the examination on discovery had not taken place” (*Lac d'Amiante* at paragraph 78), so third parties who obtain the information through other lawful means (*Juman* at paragraph 56), from other sources (*Lac d'Amiante* at paragraph 78), after it has been introduced at trial (*Lac d'Amiante* at paragraph 70) or simply by accident will not be in contempt of court for merely gaining access to the information.

[19] Third parties who obtain the information innocently but choose to use it so as to frustrate the purpose of the implied undertaking, for example by publishing private information, may also be in contempt of court. Some academic commentary cited by the respondent Institute at paragraph 45 of its factum suggests there are no restrictions on third parties who obtain information as a result of a breach of an undertaking by a party (T. Archibald & J. Morton, *Discovery: Principles and Practice*, 2d ed. (Toronto: CCH Canadian Limited, 2009) at 140).

[20] There are, however, cases which suggest otherwise. In *Distillers Co. v. Times Newspapers*, [1975] 1 All E.R. 41 (Eng. Q.B.), a party's expert sold information subject to the implied undertaking to a newspaper. The court issued an injunction to stop the paper from publishing the documents further. Later cases have treated this as an example of the court punishing the third party newspaper for contempt for using the information in a manner inconsistent with the purpose of the implied undertaking (*Mahon v. Rahn (No. 1)*, [1997] 3 All E.R. 687 (Eng. C.A.) citing with approval *Prudential*

Assurance Co. Ltd. v. Fountain Page Ltd., [1991] 1 W.L.R. 756 (Eng. Q.B.) at 764).

[21] Nonetheless, in order to be improper, the use to which the third party puts the information must be an unjustified collateral use. A third party who inadvertently obtains information subject to an implied undertaking will not be in contempt of court for using the information if it has a statutory obligation to investigate it, since a use mandated by the legislature is justified and not an obstruction of justice.

[22] An example of this type of permitted use was found in *Promex Group Inc. v. Canada*, [1998] 3 C.T.C. 2128, 98 D.T.C. 1588 (T.C.C.), a case involving the disclosure of information by a party in breach of an implied undertaking to an administrative decision maker with a duty to investigate the information.

[23] *Promex* concerned a tax dispute with the Minister of National Revenue. *Promex* and a number of other defendants had previously been involved in litigation in the Ontario courts. The documents in that litigation were subject to a confidentiality order and an implied undertaking. Those documents contained information relevant to tax assessments. A government taxation officer obtained some of the information from an informant (whose identity was not disclosed, but was probably one of the parties from the prior action) and he also went to the Ontario courthouse, where he was permitted by the registry staff to view and make copies of the confidential file, which he then used in the tax re-assessment.

[24] *Promex* challenged the re-assessment in the Tax Court, claiming, among other things, that the Minister had violated the implied undertaking when he obtained the information. The Court dismissed all of *Promex*'s objections, finding that however the Minister received the information, there was nothing improper about the Minister's actions. The Minister was not bound by the undertaking and had a statutory mandate to enforce tax compliance:

33 I turn now to the concept of implied undertaking. It is well entrenched in our law. ... Here we have the Minister of National Revenue, through his officer Mr. Vantil, not a party to the Katz action or the implied undertaking, obtaining information from the court file. Whether the court officials who, rightly or wrongly, gave Mr. Vantil access to the files ought to have done so, there is certainly no breach of any undertaking by the Minister or his officials.

34 Schedule A to Mr. Klein's affidavit sets out portions of the respondent's list of documents, as well as their source. Items 33, 35, 36, 37, 50, 51, 58, 59, 60, 61, 62 and 64 in the respondent's list of June 27, 1997, as well as items 38, 45, 51 to 62 in the respondent's list of November 14, 1997¹, as well as Exhibit 17 to Mr. Vantil's discovery are all said to have come from Mr. De Lucia's file on the IMS purchase which Master Peppiatt ordered produced. It is not clear from the evidence whether these documents were found on the court file or Mr. De Lucia handed them over to Mr. Vantil voluntarily, or whether the unnamed informant (who the appellant believes may have been the late Mr. Katz) gave them to Mr. Vantil. It is entirely possible that if either of the latter two hypotheses is true either the informant, if it was Mr. Katz, or someone else was in breach of the implied undertaking. That is, however, a matter between the parties to the Katz action, which has since been dismissed.

35 I do not think that the implied undertaking to which some of these documents may be subject binds the Minister of National Revenue who obtains the information, whether from one of the parties or a third party. The cases referred to by the appellant (*Carbone v. De La Rocha*, [1993] 13 O.R. (3d) 355 (Ont. Gen. Div.); *755568 Ont. Ltd. v. Linchris Homes Ltd.*, (1990) 1 O.R. (3d) 649 (Ont. Gen. Div.); *Orfus Realty v. D.G. Jewellery of Canada*, (1995) 24 O.R. (3d) 379 (Ont. C.A.), involved an attempted use by one of the parties of documents produced by the other party either to found an action or to give to third parties. This was held to constitute a breach of an implied undertaking not to use the documents for a collateral or ulterior purpose. In *Merck & Co. Inc. v. Apotex*, [1996] 2 F.C. 223 (Fed. T.D.), was a contempt proceeding in which MacKay J. recognized the existence of an implied undertaking. In none of these cases however, was there a use by a third party, a stranger to the proceedings in which the implied undertaking arose, called into question. In *Riddick v. Thames Board Mills*, [1977] 1 Q.B. 881 (Eng. Q.B.), an employee, in an action for damages for wrongful arrest and false imprisonment, obtained production from the company of a memorandum. The action was settled. Subsequently, the plaintiff sued the company for damages for defamation based on the memorandum. The English Court of Appeal held that the action should be dismissed. Lord Denning M.R. said at page 896:

I proceed to hold the balance in the present case. On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum of April 16, 1969, to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose.

36 The addition of the observation in " - or anyone else - " by Lord Denning was not necessary to the decision and of course was *obiter dictum*. It does not appear to have been adopted by the other two judges on the panel.

37 In *Distillers Co. v. Times Newspapers*, [1975] 1 All E.R. 41 (Eng. Q.B.) a number of claimants sued the plaintiff for damages arising out of the use of the drug thalidomide. On discovery, they obtained from the plaintiff a large number of documents which they handed over to a Dr. Phillips whom they had retained to advise them. He sold the documents to the Times Newspapers Ltd. Talbot J. issued an injunction against the Times, restraining its publication of the documents. At page 48 he said:

These submissions can therefore be summarised as follows. ... The plaintiffs claim an overriding protection from publication and use of their documents which they were compelled to disclose in the action against them. They claim this protection involves those in whose hands the documents come, particularly where the possession was unlawfully obtained. I do not doubt the correctness of this proposition; I do not think that on the authorities and for the proper administration of justice it can be argued to the contrary. Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced. I am further of the opinion that it is a matter of importance to the public, and therefore of public interest, that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case.

38 A number of observations about this statement should be made. One can readily see the merit in preventing a person into whose hands documents come that are obtained in breach of an implied undertaking of the type involved here from publishing them. Here, however, the Minister has no intention of publishing them. He has used them as the basis of an assessment and may well intend to use them in defending the assessment. There may well be public policy considerations in preventing a newspaper from publishing material obtained by purchase from one who had an obligation to keep it confidential. Here, however, we are dealing with a Minister of the Crown who has a statutory duty to assess in accordance with the facts and the law and with a taxpayer who is challenging its own income tax assessment before this court contending that relevant documentation cannot be disclosed by the Minister and need not be disclosed by it in the very proceedings in which it seeks to challenge the assessment.

(Emphasis added.)

[25] The Court in *Promex* found that the Minister had obtained the documents innocently and used them in a manner required by statute. That is the same as the factual scenario in the case at bar. There is no evidence that the Institute induced Mr. Parsons or Vales Development to hand over the documents, but once they were obtained the Institute was permitted to investigate them by virtue of the *Chartered Accountants Act, 2008*, SNL 2008, c. C-9.1 (now repealed by *Chartered Professional Accountants and Public Accountants Act*, SNL 2014, c. C-10.1, s. 75(1)(c)).

[26] To be clear, I do not mean to say that because the *Chartered Accountants Act* otherwise permitted the Institute to seize the documents, that the Institute does not have to comply with the proper procedures set out in it if it wishes to obtain them. Rather, once the Institute obtained them inadvertently, the *Chartered Accountants Act* empowered it to investigate the information, and is a legislated recognition of the fact that such a use does not obstruct justice and is justified.

[27] The appellant's appeal must therefore be dismissed. However, I note in passing that even if there was any merit to the argument of contempt by Mr. Parsons, Vales Development or the Institute, the court would not be able to grant Mr. Power the remedy that he seeks against the Institute. The trouble with Mr. Power's application in this case is that he is seeking an administrative law remedy in a private law proceeding. Mr. Power asks the Court to interfere with the Institute's administration of its statutory mandate. Such an intrusion must first be justified on administrative law principles. The Court could only interfere where, applying the appropriate standards of judicial review, the Institute is found to err in fact or law or act without jurisdiction or in a procedurally unfair manner.

[28] However, the application which is the subject of this appeal was not brought pursuant to Rule 54 of the *Rules of the Supreme Court, 1986* (which governs judicial review) but pursuant to Rule 29. Nor has the Court heard any argument about whether there has been some denial of natural justice by the Institute which would justify a stay of proceedings or, for example, an order of prohibition to enjoin the investigators exposed to the information from investigating further.

[29] As well, Mr. Power has not exhausted the Institute's internal procedures for challenging the admissibility of the evidence or requesting a stay due to the breach of an implied undertaking (see for example, *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). As confirmed in *Juman at*

paragraph 5 any information obtained by the Institute could still be challenged within its proceedings and “it would still be up to the court at the proceedings (if any) where it is sought to be introduced to determine its admissibility” (see also paragraph 57).

[30] This Court does not have the benefit of argument concerning any of these administrative law issues since the proceeding was not framed as such. It would therefore be inappropriate to pronounce on them in this appeal.

[31] I would dismiss the appeal with costs to the respondents on Column 3 of the Scale of Costs.

C. W. White J.A.

Hoegg J.A.:

[32] I agree with my colleague White J.A. that Mr. Power’s appeal must be dismissed. I also generally agree with his discussion of the law respecting the implied undertaking rule and his interpretation of *Juman*. However, I wish to add some additional comments which pertain to the facts of this case, and which in my view would be sufficient to dispose of the appeal.

[33] Mr. Power alleges that Mr. Parsons has breached the implied undertaking rule by passing on to the Institute of Chartered Accountants information and documentation he received in discovery proceedings pertaining to litigation between them. The Institute is the regulatory body of chartered accountants, of which Mr. Power is one. Mr. Parsons provided the information and documentation to the Institute in support of two complaints of professional misconduct he made against Mr. Power. Mr. Power asks this Court to dismiss the complaints Mr. Parsons made to the Institute, and enjoin the Institute from investigating and otherwise using the information and documentation submitted by Mr. Parsons to investigate the complaints.

[34] Mr. Parsons and/or Vales Development maintained at trial that the information and documentation that Mr. Parsons passed on to the Institute was owned or possessed by them or that they were otherwise entitled to use

it. They argued that just because Mr. Power finally disclosed it through discovery did not mean that the implied undertaking rule was engaged. They argued that Mr. Parsons could not be in breach of the implied undertaking rule by passing on his own information and documentation to the Institute.

[35] The trial judge agreed with Mr. Parsons and Vales Development (as my colleague acknowledges in paragraph 3 above), saying, at paragraph 63 and 67:

The First and Second Respondents have established the independent availability or entitlement to same and so in general meet the exception to the implied undertaking insofar as these documents did not engage the protection of the Applicant's privacy interest vis-à-vis the Respondents.

...

In the present case, the evidence is that the information disclosed by the Applicant was within the ownership of the Respondents or communicated to the Respondents and so in their possession.

[36] One of the disclosed documents was not owned by Mr. Parsons and Vales Development. It was a document that had been prepared as part of the records of 10546 Nfld. Limited (10546) and which recorded transactions between Brian Babb or Babb Construction Ltd. and 52182 Newfoundland and Labrador Limited (52182). 52182 is a company of which Mr. Parsons was a shareholder and director. The trial judge found that Mr. Parsons did not own this document but that it was required to be disclosed to Revenue Canada by 52182 and therefore the protection afforded to it by the implied undertaking rule was overridden by legislation and Mr. Parsons could use it. The trial judge also found that Mr. Power did not have a privacy interest in the information and documentation that Mr. Parsons passed on to the Institute.

[37] On appeal, no challenge was made by Mr. Power to the trial judge's ruling that Mr. Parsons and Vales Development had ownership of all of the disclosed information and documentation except for the one document disclosable by legislation to Revenue Canada. Also on appeal, Mr. Power did not establish, or even argue, that the trial judge erred in determining that the exempted document in the records of 10546 had to be filed with Revenue Canada. Compliance with statutory law is a recognized exception to the

implied undertaking rule, as my colleague notes in paragraph 10 of his decision, and as also noted at paragraph 39 of *Juman*.

[38] In light of the fact of the judge's findings that Mr. Parsons and Vales Development established ownership and independent availability and entitlement to the information and documentation have not been disturbed, the implied undertaking rule does not prevent Mr. Parsons from passing the material on to the Institute. Accordingly, in my view the trial judge did not err in deciding that the implied undertaking rule did not operate to prevent Mr. Parsons from passing on the information and documentation to the Institute.

[39] Much time and effort was spent by Mr. Power's counsel arguing that the judge misinterpreted and misapplied the *Juman* case, which is authoritative law on the implied undertaking rule. The *Juman* case is manifestly different from the facts of this case. It concerned whether the police could access the discovery evidence of a litigant on the basis of public interest in public safety. In *Juman*, police sought to obtain and use discovery evidence given by the defendant in a civil action so as to use it against her in a criminal investigation and possibly in a criminal prosecution. The defendant claimed protection of her discovery evidence under the implied undertaking rule, saying that her discovery evidence, which was given under oath in a civil action, could only be used for the purposes of the civil action. The Court agreed with her that the use of her discovery evidence was for the purpose of the litigation in which it was given, and that the protection it afforded her vindicated the purposes of the rule – that it was her private evidence, and that she, as a litigant, had been forthright and candid, and compelled by statute, in giving evidence directed to get at the truth respecting a legal action (*Juman* at paragraph 26), and that public policy should and does operate to prevent the dissemination of the given information beyond the purposes for which it is given in such cases.

[40] *Juman* speaks to the rationales for the rule which, in the first place, is to protect the privacy and private information of discovery witnesses who are to be left alone with their thoughts and papers (*Juman* at paragraph 24). That is that litigating parties must be confident that the private information they are compelled by statute to disclose on discovery will only be used in respect of that litigation. Another rationale for the rule is to encourage “complete and candid discovery” by assuring discovery witnesses that their honest and forthright discovery evidence will not be used for an ulterior or collateral purpose to the proceedings (*Juman* at paragraph 26).

[41] My colleague has canvassed the jurisprudence and compiled a list of exceptions to the protection afforded by the rule at paragraph 10 above. The list does not include an exception respecting material already owned by the person disclosing it. There is nothing in *Juman* that speaks to the implied undertaking rule operating to prevent dissemination of information or documentation which is owned by the person or party who wishes to disseminate it just because that person obtained it at discovery when the opposing party has no privacy interest in it.

[42] In *Lac d'Aminate*, the Court stated that a party wishing to use information or documentation disclosed on discovery should not be given the burden of applying to court for leave before using the material if it is otherwise accessible to the public, merely because the information was also communicated at an examination for discovery (paragraph 78). I would apply the same reasoning to information and documentation that a litigant owns but finally obtains in a discovery. Mr. Parsons and/or Vales Development owned or were otherwise entitled to use the information that Mr. Parsons disclosed to the Institute – it was information belonging to him and/or Vales Development; they just could not get it until Mr. Power was forced to disclose it in litigation. In my view, Mr. Parsons should not be burdened with having to apply to a court to use his and/or Vales Development's own information, as *Lac d'Amiante* reasoned in the context of publically available information, before using it.

[43] The trial judge found that Mr. Power could not rely on the implied undertaking rule to prevent Mr. Parsons from disclosing his own information just because he (finally) obtained it in a discovery. I agree with the trial judge. To say otherwise borders on the absurd. To force a litigant such as Mr. Parsons to seek the court's permission to disclose his own information would be onerous, as his counsel argued on appeal, and in my view not in keeping with the Supreme Court of Canada's reasoning in *Lac d'Amiante*. Moreover, it would enable Mr. Power to frustrate Mr. Parsons' ability to deal with his own information – to Mr. Power's advantage. In my view, Mr. Power cannot be permitted to benefit from his withholding of Mr. Parsons' and Vales Development's information in this way. Accordingly, I would also say that the Institute cannot be constrained in its use of the information and documentation Mr. Parsons disclosed to it by reason of the implied undertaking rule.

[44] Like my colleague, I would dismiss Mr. Power's appeal.

L. R. Hoegg J.A.

Green J.A.:

[45] I would dismiss the appeal for the reasons given by my colleague, White J.A.

[46] In light of the nature of the concurring reasons of my colleague, Hoegg J.A., however, I wish to make some further observations about her approach to the matter.

[47] The conclusion of White J.A. that the Institute, as a third party with a statutory obligation to investigate complaints, inadvertently received the documents and that in those circumstances the Institute was not bound by the implied undertaking rule is sufficient to dispose of this appeal.

[48] It was submitted during the hearing, however, that in any event Mr. Parsons was not subject to the implied undertaking rule (and could disclose the documents in question to whomever he wanted) because all but one of the documents were already owned by him; accordingly he had a right to them and to their disposition. It is this argument that forms the basis of the concurring reasoning of my colleague, Hoegg J.A. I would be reluctant to found my conclusion in this case on that reasoning.

[49] The applications judge referred to and relied on Mr. Parsons' document ownership in concluding that Mr. Power had no expectation of privacy in those documents and therefore was not subject to the implied undertaking rule. White J.A. concluded, for reasons expressed earlier with which I agree, that the fact that there is no privacy or confidentiality interest at stake is not a sufficient reason for concluding that the implied undertaking rule is not engaged. The rule is underpinned by other rationales, not the least of which is that of promoting litigation efficiency. As a means of promoting disclosure, parties to litigation need to be assured that in disclosing documents or information in their possession or within their knowledge they

can do so in the confidence that the material will not be used by the other parties for a purpose collateral to the subject litigation, unless authorized by subsequent court order, where the respective rights and interests can be fully addressed before further use is made of the material.

[50] The idea behind the rule is encapsulated in Binnie J.'s statement quoted by White J.A. that "whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order" (*Juman*, paragraph 25). To be effective, the rule must of necessity be formulated to operate widely. Accordingly, there are only limited exceptions to the rule.

[51] It is noteworthy that in the leading decisions in the Supreme Court of Canada ownership *simpliciter* by the receiving party of the disclosed documents is not mentioned as an exception to the application of the rule. One exception that is recognized, however, is information that may be obtained from "other sources" or is publicly available. That is so because using the documents obtained from other sources logically does not engage the implied undertaking rule at all and it would be perverse to prevent a party who can access material by means other than the disclosure process from using that material simply because another copy of it surfaces in the discovery process.

[52] Thus, in this case, if by virtue of his ownership Mr. Parsons could have accessed other copies of the documents from other sources, either from his own files or elsewhere, he could have used those materials free from the rule. But that is not the situation here. Apparently, Mr. Parsons had no access to the documents from any source other than those in Mr. Power's possession.

[53] The fact, therefore, that Mr. Parsons claimed ownership of the documents, without more, was not a sufficient basis for Mr. Parsons to claim he was not subject to the rule on the basis of the "other sources" exception.

[54] It is tempting to conclude in this case that the fact that the applications judge ultimately vindicated Mr. Parsons' ownership claim after the fact in the course of the current application is sufficient to justify non-application of the rule. I would be reluctant to accept this too-easy proposition.

[55] As submitted by counsel for Mr. Power in argument, the proposition amounts to affirming the adage that "it is easier to ask for forgiveness than

to seek permission.” It would encourage parties to litigation to disregard the rule first and seek to justify disclosure to third parties after the fact. One cannot assume in all cases that a claim to ownership will always be self-evident. There may be issues, on which the other party would want to be heard *before* disclosure, such as claims of co-ownership, disputed ownership or retention rights on the basis of a possessory lien claim, to name a few. If the document-receiving party is permitted to act to disclose without first obtaining a court order, it will be too late if after the fact it is determined that the right to ownership did not in fact exist or was in some manner qualified. The damage will already be done. It is not enough to say that the receiving party takes that risk. It is the interest of the disclosing party that must also be considered. Without considering those other interests, the true value of the implied undertaking rule in encouraging full disclosure would be undermined.

[56] Accordingly, I do not accept (nor is it necessary to do so for this case) that ownership of the material by the receiving party means, for that reason alone, that the rule is not engaged. While, given the fact that in this case unqualified ownership appears to have been ultimately established, no harm appears to have been done to any retention interests of Mr. Power vis-à-vis Mr. Parsons, that should not lead to recognition of a general proposition that it is permitted to disclose to third parties in all cases based on a claim to ownership *simpliciter* without first obtaining a court order.

J.D. Green J.A.