

CANADA / JUDGMENT

Malii v. British Columbia

2024 BCSC 2060

COURT

Supreme Court of British Columbia

DECIDED

12 November 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 2060 Malii v. British Columbia IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Malii v. British Columbia, 2024 BCSC 2060 Date: 20241112 Docket: S036687 Registry:

Vancouver Between: Malii also known as Glen Williams, Gwaas Hlaam also known as George

Philip Daniels, Luuxhon also known as Don Russell, Gamlaxyeltxw also known as Wilhelm

Marsden, Sindihl also known as Robert Good, Watakhayetsxw also known as Agatha Bright,

Gwinuu also known as Phyllis Haizimsque, Wii'litsxw also known as Gergory Rush, Haizimsque

also known as Ken Russell, on behalf of themselves and in their capacity as the Gitanyow

Hereditary Chiefs and on behalf of all members of the Gitanyow Nation Plaintiffs And His

Majesty the King in Right of the Province of British Columbia, the Attorney General of Canada

and Skii Km Lax Ha also known as Darlene Simpson, on behalf of herself and in her capacity as

Tsetsaut / Skii Km Lax Ha Hereditary Chief and on behalf of all members of the Tsetsaut / Skii Km

Lax Ha Nation Defendants And His Majesty the King in Right of the Province of British Columbia

and The Attorney General of Canada Third Parties Before: The Honourable Justice Stephens

Reasons for Judgment (Province's Application for Declaratory Relief re Disclosure of Plaintiffs'

Proposed Expert Reports and Other Litigation Materials) Counsel for the Plaintiffs: P.R.A. Grant,

KC J. Phillips, KC E. Ritcey Counsel for the Defendant, His Majesty the King in Right of the

Province of British Columbia: K.B. Bergner M.E. Casey M.C. Ohama-Darcus Counsel for the

Defendant, Skii km Lax Ha, also known as Darlene Simpson, also known as Chief Simpson, on

behalf of herself and, in her capacity as Tsetsaut/Skii km Lax Ha Hereditary Chief, on behalf of

all members of the Tsetsaut/Skii km Lax Ha Nation: A. Fontaine Counsel for the Defendant, the

Attorney General of Canada: A.M.L. Harvey J.L. Ingram Place and Date of Hearing: Vancouver,

B.C. October 2 and 11, 2024 Written Reply Submissions of the Defendant, His Majesty the King in

Right of the Province of British Columbia: October 16, 2024 Written Sur-Reply Submissions of the

Plaintiffs: October 18, 2024 Place and Date of Judgment: Vancouver, B.C. November 12, 2024

[1] The defendant Province has brought this application seeking declaratory relief with respect to expert reports served by the plaintiff pursuant to R. 11-6, and five categories of other documents including deposition transcripts, certain affidavits, notices to admit, transcript excerpts identified by the plaintiffs and discovery transcripts.

- [2] Specifically, the Province's notice of application filed September 12, 2024 seeks the following declarations:
1. A declaration that any litigation privilege has been waived in respect of some or all of:
 - a. the reports served by the plaintiffs pursuant to Rule 11-6 of the Supreme Court Civil Rules (together, the "Plaintiffs' Proposed Expert Reports"); and
 - b. the following evidence and other materials in this proceeding:
 - i. deposition transcripts of Sindhil/Robert Good (2014-2016), Haizimsque/Ken Russell (2015), Wii'litsxw/Gregory Rush (2016) and Malii/Glen Williams (2022); ii. affidavits of Sindhil/Graham Morgan, Malii/Glen Williams, Singewin/Dennis Gogag, Watakhayetsxw/Deborah Good, Luuxhon/Don Russell, Gamlaxyeltxw/Wilhelm Marsden, Haizimsque/Verna Howard, and Gwaas Hlaam George Phillip Daniels; iii. notices to admit delivered by the plaintiffs (and related responses); iv. Delgamuukw transcripts identified by the plaintiffs; and
 - v. transcripts from examinations for discovery of the plaintiffs (as those transcripts become available) (together, the "Other Litigation Materials").
 2. A declaration that an implied undertaking of confidentiality does not extend to use of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials in this proceeding;
 3. Further, or in the alternative, a declaration that the Province is free to disclose copies of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials to non-parties for use within this proceeding; however, disclosure is subject to the condition that, prior to disclosure, any non-party recipient of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials (other than the defendants' potential experts) must provide confirmation in writing to counsel for the Province that, regarding use of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials, the non-party will abide by any implied undertaking of confidentiality as though it was a party of record in this proceeding.
 4. Such further and other relief as this Honourable Court may deem just.
- [3] I understand that para. 1(b)(ii) of the relief sought, while not stating so expressly, refers to affidavits given in response to interrogatories; and that para. 1(b)(iv) is meant to refer to excerpts of the transcripts which have been identified by the plaintiffs.
- [4] The application is brought in a context where the trial of this action is currently scheduled to commence on March 3, 2025 for 90 days: *Malii v. British Columbia*, 2024 BCSC 1062 at paras. 24-25.
- [5] The application appears to have as its origin the Province's proposal to provide several types of documents which have provided by the plaintiffs in this action to counsel for the Nisga'a Nation. This is a matter of dispute with the plaintiffs, which was adverted to in my reasons adjourning the trial of this action in June: *Malii v. British Columbia* at paras. 6-7.

- [6] However, the relief sought in paras. 2 and 3 of this application is not specific to the Province providing documents to the Nisga'a Nation.
- [7] The issues on this application concern litigation privilege (para. 1 of the relief sought) and the implied undertaking of confidentiality (paras. 2 and 3).
- [8] With respect to the implied undertaking, this issue may come before the court in various ways: for example, through an application of a party seeking orders preventing certain documents from being accessed or to prohibit a certain disclosure, or for the implied undertaking to be varied: *Juman v. Doucette*, 2008 SCC 8; or, on an application for a protective order restricting what another party and their counsel can do with documents or information provided through discovery, or for a sealing order: *Larkin v. Johnson*, 2019 BCSC 164 at paras. 4, 79.
- [9] The circumstances of this application are different because the relief sought by the Province with respect to the implied undertaking is declaratory. It seeks a declaration that the "implied undertaking of confidentiality does not extend to use of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials in this proceeding" (para. 2); and "a declaration that the Province is free to disclose copies" of documents "to non-parties for use within this proceeding" but subject to a condition regarding a confirmation in writing from the non-party about use of the documents (para. 3). (Regarding litigation privilege, the application seeks a declaration of waiver of "any litigation privilege" in respect of "some or all" of the subject documents.)
- [10] The Province submits, among other things, that "[g]iven the plaintiffs' position to date, clarification from this Court on the scope of permissible use of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials is required." (Notice of Application, Part 2, para. 10).
- [11] I have not been referred to a decision where declaratory relief about the implied undertaking was sought or granted by the court in the form set out in paras. 2 and 3 of the relief sought. While the issue of the appropriateness of declaratory relief was not addressed in any significant way in the parties' written or oral submissions on the hearing of this application, I must be mindful of the law regarding the appropriateness of granting a declaration: see generally *West Moberly First Nations v. British Columbia*, 2020 BCCA 138; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228; and *Kraft Heinz Canada ULC v. Canada (Attorney General)*, 2022 BCSC 796.
- [12] *Schober v. Tyson Creek Hydro Corporation*, 2013 BCSC 2042, aff'd 2014 BCCA 12, and *Piche v. Chiu*, 2013 BCSC 747, involved declaratory relief regarding the implied undertaking, but those cases did not appear to involve the same form of declaratory relief as sought on the application before me.

- [13] Without being critical of any of the parties, I am concerned with the absence of argument as to whether declaratory relief could be granted in the form sought on this application. My concern relates chiefly to the issue of the implied undertaking which is raised in paras. 2 and 3 of the relief sought, but I consider that the relief with respect to waiver of privilege (para. 1) ought to be heard at the same time as the implied undertaking relief.
- [14] I therefore adjourn this application generally, giving leave to the Province to reset the application, and to file an amended notice of application if it wishes to do so.
- [15] Three days have been set aside for the hearing of applications in this action before me from December 17 -19, 2024, and the Province may reset this application during that block of time or make a request to appear through Supreme Court Scheduling if an earlier date is sought.
- [16] I am cognizant of the approaching trial date, that the Province wishes to provide documents to the Nisga'a Nation, and has filed this application to seek resolution of an apparent disagreement with the plaintiffs about the Province's permissible use of the Plaintiffs' Proposed Expert Reports and Other Litigation Materials.
- [17] However, I require more fulsome submissions on this issue, particularly because the declarations sought on this application (regarding the implied undertaking in particular) appear to be cast in novel terms.
- [18] By adjourning this application, I make no comment on the merit of the parties' underlying legal positions on the existence and scope of litigation privilege and the implied undertaking and the permissible use of documents subject to an implied undertaking.
- [19] In the result, I order that the notice of application is adjourned generally, with liberty to the Province to reset the application, or an amended notice of application. "Stephens J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/20/2024BCSC2060.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/malii-v-british-columbia-2024-bcsc-2060>

Prepared on 28 October 2026 · Esheria