

CANADA / JUDGMENT

Nuchatlaht v. British Columbia

2021 BCCA 351

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 351 Nuchatlaht v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nuchatlaht v. British Columbia,

2021 BCCA 351

Date: 20210924

Docket: CA46761

Between:

The Nuchatlaht and Chief Walter Michael,

on his own behalf and on behalf of all of the members of the Nuchatlaht

Respondents

(Plaintiffs)

And

Her Majesty the Queen in Right of the Province of British Columbia,

the Attorney General of Canada and

Western Forest Products Inc.

Respondents

(Defendants)

And

Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and

Tla-o-qui-aht First Nations

Appellants

Corrected Judgment: The text of the judgment was corrected

at paragraph 31 on September 29, 2021.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia,

dated February 25, 2020 (Nuchatlaht v. British Columbia, 2020 BCSC 252, Vancouver Docket S170606).

Counsel for the Appellants:

L. Glowacki

Counsel for the Respondent Her Majesty the Queen in Right of the Province of

British Columbia:

M. Doherty

Place and Date of Hearing:

Vancouver, British Columbia

September 7, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 24, 2021

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

Summary:

In the litigation below, relating to Aboriginal title, the Province was granted an order relieving it from its implied undertaking of confidentiality with respect to documents produced by the Appellants in other litigation. The Appellants appeal that order. They argue that to relieve a party of its implied undertaking, the court must find that there are "exceptional circumstances" and that the circumstances in this case are not exceptional. They also argue that the Province breached the undertaking (by way of searches and communication) prior to the order, which should weigh against relieving the Province of its undertaking. Held: Appeal dismissed. The test for relief from the implied undertaking does not require the court to find "exceptional circumstances." A court may relieve a party of its implied undertaking where there exists a public interest of greater weight than the values the implied undertaking is designed to protect. The chambers judge properly applied this test, alive to the Aboriginal law context of the case. It was not a breach for the Province to search the documents prior to it being relieved of the undertaking; the searches were appropriate in order to list the documents as privileged. It was also not a breach for the Province to communicate to a third party some of the material that was subject to the undertaking. That communication was for the purpose of assessing compliance with the undertaking, and that third party was the person who had originally prepared the communicated material.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Overview

- [1] This appeal arises from an application below to relieve the Province of its implied undertaking not to make use of documents disclosed to it in prior litigation for any other purpose. In an order pronounced and entered 25 February 2020, the chambers judge granted the Province's application, allowing the Province to make use of documents produced by the Appellants in prior litigation in subsequent litigation to which the Appellants were not parties. The Appellants argue the judge erred in relieving the Province of its undertaking absent "exceptional circumstances."
- [2] In my view, a court may relieve a party of its implied undertaking where there exists 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, while being alive to the Aboriginal law context of the case.
- [3] The Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht First Nations (the "Appellants") belong to the Nuuchah-nulth cultural and linguistic group originating on the west coast of Vancouver Island. In 2003, the Appellants and other Nuuchah-nulth Nations, including the Nuchatlaht, initiated an action claiming Aboriginal fishing rights and title to fishing territories on and around Nootka Island (the "Ahousaht litigation"). The Province of British Columbia defended the title claim. In that litigation, the Province obtained by production approximately 70,000 documents relevant to the litigation, of which a portion were disclosed by the Appellants (the "Ahousaht collection"). Documents disclosed by parties to litigation are subject by law to an implied undertaking not to make use of the

documents for any other purpose: the implied undertaking of confidentiality. Not all of the documents in the Ahousaht collection are subject to the implied undertaking.

- [4] In 2007, the Nuchatlaht's claims, along with those of two other Nations, were severed and held in abeyance for trial at a later date. This was to avoid overlapping claims and conflicts of interest between the claimants, who were represented by a single law firm: see *Ahousaht Indian Band v. Canada (Attorney General)*, 2007 BCSC 1162. The First Nations whose claims were severed for a later trial phase remained parties to the Ahousaht litigation. Document production had already taken place prior to the Crown's application for severance and, as such, the Province, Canada, and the Nuchatlaht have already had access to the Ahousaht collection. The claims of the Appellants proceeded to trial. The implied undertaking ends when a document is used in open court: *Chellappa v. Kumar*, 2016 BCCA 2 at para. 35. We are told that not all of the documents in the Ahousaht collection were introduced as exhibits at trial. Accordingly, for those not introduced at trial, the implied undertaking subsists.
- [5] The Nuchatlaht's severed claims in the Ahousaht litigation have not yet gone to trial. The Nuchatlaht have, however, commenced separate litigation asserting Aboriginal title to land on Nootka Island, with the Province, Canada, and Western Forest Products as defendants. In preparation for that litigation, the Province attempted to search the Ahousaht collection for documents disclosed by the Nuchatlaht in the Ahousaht litigation. Some documents turned up in the search were subject to the implied undertaking of confidentiality. In 2019, the Province filed an application seeking to be relieved of its implied undertaking with respect to certain documents produced in the Ahousaht litigation and for the production of further documents believed to be in the possession of the Appellants. The Nuchatlaht did not object to the use of documents it disclosed in the Ahousaht litigation, but the Appellants opposed the application of the Province.

Chambers Judgment

- [6] Justice Myers began by stating that parties to litigation enter into an implied undertaking to the court that documents are to be used only for the purposes of the litigation in which they were produced. If parties wish to use documents produced in litigation for some other purpose, they must obtain the permission of the party who produced the document or a court order. On an application to relieve a party from the undertaking, the judge noted the applicant must demonstrate the existence of a public interest of greater weight than the values the implied undertaking is designed to protect (privacy and the efficient conduct of civil litigation), quoting *Juman v. Doucette*, 2008 SCC 8 at para. 32. The judge also quoted from *Juman* at para. 35, where the Court wrote that such applications will generally be granted where the subsequent litigation, in which the discovery material is sought to be used, involves the same or similar parties and issues.

- [7] The judge described the Nuchatlaht's claim for Aboriginal title. He noted the Province's position that the main issue to be determined was exclusive occupation, such that pertinent to deciding the claim was the use made of the claimed territory by other Indigenous peoples at the relevant time.
- [8] Referring to Juman, the judge examined the relatedness of the two actions. He stated that cases can be related to varying degrees and found that there exists a similarity of issues between the Nuchatlaht litigation and the Ahousaht litigation, despite the fact that the Ahousaht litigation involved a claim for fishing rights and the Nuchatlaht litigation seeks a declaration of Aboriginal title. He noted the geographic areas implicated in each case were adjacent. Moreover, while the parties in the two cases are not identical, the judge noted that the trial judge in the Ahousaht litigation found co-mingling of the Ehattesaht and the Nuchatlaht and remarked that the Nuchatlaht remained a party to the Ahousaht litigation.
- [9] The judge finally noted that all parties to the Nuchatlaht litigation apart from Western Forest Products have already had access to the documents produced in the Ahousaht litigation, and therefore there was little, if any, prejudice from their use in the Nuchatlaht litigation. He further noted that Western Forest Products' role in the litigation was limited and it had agreed not to view the documents. The judge stated that he appreciated that sensitive information might be found in some of the documents produced by the Appellants but was of the view that there were mechanisms (presented later at para. 25 of this judgment) that could be put in place at trial to protect that information. The judge also considered that the Nuchatlaht's severed claim to Aboriginal title and fishing rights, originally advanced in the Ahousaht litigation, may go to trial following the conclusion of the Nuchatlaht litigation over title to land. He found that, given the overlapping claims, allowing access to the documents before that litigation proceeded to trial would avoid the risk that documents would later come forward which might have had a bearing on this case and which may cast doubt on its outcome. He determined it was preferable that this case be decided on the fullest possible record.
- [10] The judge then rejected the argument of the Appellants that the Province should not be relieved of its undertaking because it had already breached it by searching in the collection database. The Province claimed it had searched the collection for two reasons: to locate documents disclosed by the Nuchatlaht and to enable it to list as privileged relevant documents disclosed by any parties in the Ahousaht litigation. The judge concluded that the Province had not breached its undertaking, given its obligation to list the documents on its privileged list, citing *Chonn v. DCFS Canada Corp. (dba. Mercedes-Benz Credit Canada)*, 2009 BCSC 1474.
- [11] On balance, the judge concluded the Province should be relieved of its implied undertaking for the documents in the Ahousaht collection. He set out a procedure for production of the documents that afforded the Appellants an opportunity to review the list and raise any confidentiality concerns they may have.

[12] The Province had also applied for an order that the Ehattesaht produce traditional use studies ("TUS") prepared for them. The judge distinguished this request from the application to set aside the undertaking, noting the TUS had been prepared for the Ehattesaht alone and not with litigation in mind. The Ehattesaht were not a party to the Nuchatlaht litigation. The judge accepted the submission of the Ehattesaht that the documents may contain confidential and sensitive information and dismissed the application.

Issues

- [13] While the parties have organized the issues differently, in my view, at issue in this appeal is whether the judge erred by relieving the Province of its implied undertaking by:
- a) failing to require or find exceptional circumstances or a public interest of sufficient weight to justify setting aside the undertaking;
 - b) failing to properly account for the privacy interests of the Appellants or the prejudice they would suffer if the undertaking were set aside; or
 - c) finding that the Province did not breach the implied undertaking.

Analysis

Issue #1: Did the judge err by failing to require or find exceptional circumstances or a public interest of sufficient weight to justify setting aside the undertaking?

Issue #2: Did the judge err by failing to properly account for the privacy interests of or prejudice suffered by the Appellants?

Positions of the Parties

- [14] I will deal with these issues together. They both are ultimately about whether the judge applied the correct test on an application to be relieved of the implied undertaking.
- [15] The Appellants rely on para. 32 of Juman, which states that an applicant seeking to be relieved of its implied undertaking must demonstrate the existence of a public interest of greater value than those protected by the undertaking; namely, privacy and the efficient conduct of civil litigation: Juman at paras. 32, 38. Moreover, the Appellants argue that an undertaking should only be set aside in exceptional circumstances: Juman at para. 38. The Appellants take the position the judge misapplied this standard.
- [16] The Appellants contend the chambers judge did not find the required exceptional circumstances in this case to warrant relieving the Province of its undertaking. They say the circumstances in this case are common and inhere to litigation between the Crown and Indigenous peoples under s. 35. The Appellants point out that the respective lands implicated in the Ahousaht and Nuchatlaht litigations were merely adjacent and there are no overlapping claims. That the Nuchatlaht, a neighbouring First Nation, is a party to both actions is not exceptional. Likewise, the Appellants argue, it is not exceptional that the

Crown is acting as respondent in both actions and therefore in possession of documents from the Ahousaht litigation. The judge failed to identify the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, as required by Juman. The Appellants say the judge merely relied on a hypothetical future scenario in which the Ahousaht documents may later prove to have been relevant and cast doubt on findings made in the Nuchatlaht litigation. The Appellants also say the judge discounted the privacy interests at stake, counter to this Court's ruling in Chonn.

- [17] The Province submits that the judge's exercise of discretion is entitled to considerable deference because it was made by a case management judge, citing *Haida Nation v. British Columbia*, 2018 BCCA 462 at para. 23. The Province says the judge's order was well within his discretion to make, that he considered the relevant factors, and arrived at a sensible outcome consistent with case law regarding implied undertakings. The Province contends the Appellants have misrepresented the test for setting aside the implied undertaking which arises out of Juman. It says exceptional circumstances are not a prerequisite in every case. The Province also says this case falls squarely within a category of cases where the undertaking will generally be set aside, as described in Juman: that is, subsequent litigation involving the same or similar parties and the same or similar issues.

Analysis

- [18] The Province says the Appellants cite the wrong test. There is no requirement arising out of Juman to find "exceptional circumstances"; rather, the pertinent focus is the interests of justice. In Juman at para. 34, Justice Binnie stated:
- [34] Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings (see Queen's Bench Rules, M.R. 553/88, r. 30.1 (Manitoba); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario); Rules of Civil Procedure, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

- [19] The Province says this is the correct expression of the test and that the reference to exceptional circumstances in para. 32 of Juman is not a mandatory factor that must be found in every case. At para. 32, Justice Binnie wrote:
- [32] 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. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police

investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. 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.

- [20] I agree with the Province that para. 34 of Juman is the "test" which emerges from that decision because it is stated as such quite explicitly. Both para. 32 and para. 34 have been cited by courts as the "test" to be applied in considering whether to relieve a party of its implied undertaking, however: see e.g., *British Columbia v. Tekavec*, 2012 BCSC 1348 at para. 14 [Tekavec] and *Traders General Insurance Company v. Elizabeth Gibson*, 2019 ONSC 1599 at para. 7 (citing para. 34 of Juman); but see *Manning v. Dhalla*, 2019 BCSC 1067 at para. 22 (citing para. 32 of Juman). This Court has previously cited para. 32 for the test emerging from Juman: see *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2014 BCCA 258 at para. 28. In my view, the first sentence of para. 32 is a restatement of the test from para. 34. The reference to "exceptional circumstances" comes later in para. 32.
- [21] As I have related, the Appellants forcefully submit that the judge misinterpreted or failed to apply the correct legal standard: the judge failed to require or find "exceptional circumstances."
- [22] This is in aid of attenuating the deference otherwise owed a judge's exercise of discretion; deference is dissipated in the face of an error in principle--an error in stating the correct legal test. In my view, the "exceptional circumstances" submission is something of a straw man; it is not the test to apply in setting aside the undertaking. The Appellants misread para. 32 of Juman. To repeat a portion of that paragraph:

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.

- [23] There, the Court is not stating the test for being relieved of the undertaking; it is rather saying that exceptional circumstances will only be demonstrated on a balance of probabilities where there exists 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. Quite simply, the "public interest of greater weight" is the exceptional circumstance justifying relief from the implied undertaking. To repeat myself, this reading of para. 32 is made clear by the express statement of the test in para. 34 of Juman.
- [24] Here, the judge articulated the correct test and applied it. He referred to the scenarios described in paras. 35 and 36 of Juman (in the one: use of the materials sought in another action "with the same or similar parties and the same or similar issues," and in the other: use of the material for an "extraneous purpose, or for an action wholly unrelated" to the purposes of the earlier proceeding) as meant "to represent opposite sides of a

spectrum" (Chambers Judgment at para. 23). He concluded that this case falls much closer to the "same or similar parties and issues" end of the continuum and he was clearly correct in his assessment.

- [25] Contrary to the Appellants' submission, the judge did not ignore or discount the privacy interests of the Appellants. On the contrary, because of the breadth of the disclosure in the Ahousaht litigation and to whom it was made, the judge saw no "meaningful incremental invasion of privacy" (emphasis added). The judge was alive to the privacy interests of the Appellants; he simply concluded that they would not in the circumstances be significantly further invaded by relief from the undertaking in the context of the Nuchatlaht litigation. And the judge further addressed the Appellants' privacy interests by building in the liberty to apply provision in favour of the Appellants in para. 2 of his order:
2. Before it may rely on or use any Mowachaht/Muchalaht or Ehattesaht First Nation document disclosed in Ahousaht Indian Band and Nation et al. v. Canada (Attorney General) et al. (BC Supreme Court Action No. SO33335), the Province will provide a list of any such documents to counsel for the Respondents and provide an opportunity for them to raise any issue concerning specific documents, such as heightened confidentiality concerns.
- [26] I do not accept the submission that the judge's findings with respect to privacy or prejudice are inconsistent with Chonn. In that case, Justice Voith was explaining the scope of the general implied undertaking rule, not the situation in which a court grants leave to a party to make use of prior obtained documents in subsequent litigation: see, e.g., Chonn at para. 25.
- [27] Similarly, I do not find the two cases dealing with traditional use studies ("TUS") cited by the Appellants to be particularly helpful: *Yahey v. British Columbia*, 2018 BCSC 123; *Cowichan Tribes v. Canada (Attorney General)*, 2020 BCSC 1507. Those cases dealt with assertions of privilege over specific communications the Crown sought to introduce in litigation over Aboriginal rights and title. The information had not been introduced in court and the expectation of the parties to the communications was that it would not be. In each case, the Supreme Court held the communications were protected by case-by-case privilege, considering, among other things, the honour of the Crown and the constitutional context of the duty to consult. In my view, these cases are not apposite to a case where the information has already been proffered as evidence in similar litigation involving the same or similar parties. Indeed, in *Yahey*, Justice Burke expressly excluded from protection affidavit material that was intended for use in court proceedings:
- [27] I note however that this protection applies only to those records of members who will not be witnesses at trial. Given that there is probative value to the testimony of members who will be witnesses at trial, and there is the Informed Consent form that explicitly waives confidentiality regarding use of the information in court proceedings, member participants were aware of the possibility of the use of this information in court proceedings. It would therefore be artificial to preclude this information of witnesses who will be testifying on this

issue at trial.

- [28] As participation in the court process was explicitly recognized in the Consent form, production of their interview records cannot therefore be said to harm the constitutionally recognized consultation process.

[Emphasis in original.]

- [28] The judge in this case similarly distinguished between the production of the Ehattesaht's TUS, which was in the hands of a third party and prepared for that party alone, and the undertaking issue, which involved documents already produced in prior litigation (paras. 36-38).
- [29] In my view, it was most appropriate for the judge to consider the potential for inconsistent findings when the severed Nuchatlaht claims eventually proceed to trial. He noted there were overlapping claims in the Ahousaht litigation, to which the Nuchatlaht remained a party, and was concerned that already-disclosed documents may come forward in that trial which would have influenced the outcome of the Nuchatlaht title litigation. He considered this would bring the administration of justice into disrepute. The Appellants say that litigation may not proceed to trial, but offer nothing to indicate that it will not, nor any authority that this was an inappropriate consideration. In my view, the judge was well-positioned to evaluate this potential outcome as case management judge, and the important public interest he identified should not be discounted because it is "hypothetical" or "speculative."
- [30] Finally, the Appellants say the judge's order effectively created a different standard for s. 35 litigants than for other civil litigants. The Appellants argue that, in the context of s. 35 litigation, the Province will often be in the possession of documents from prior litigation by virtue of being a frequent litigant, and many First Nations will need to bring multiple actions raising overlapping or adjacent claims to pursue their constitutional rights. The judge's order effectively sets a standard that these factors alone, which are inherent to s. 35 litigation, are sufficient to relieve the Province of its undertaking. This affords lesser protection to s. 35 litigants and creates the potential for systemic disadvantage. The Province says this case falls squarely into the category described in Juman at para. 35 and the Appellants are being treated no differently than any other civil litigant.
- [31] The judge was alive to the Aboriginal law context of the case. In his view, the demands imposed by that context only supported the order he made:
- [29] In her judgment ordering the test case procedure (2007 BCSC 1162), Garson J. noted the uniqueness of native title cases:

[57] At the outset of this discussion, the unique nature of [A]boriginal rights and title litigation and the distinctive approach required in order to bring the parties closer to the objective of reconciliation, must be considered. In *Kwakiutl Nation v. Canada (Attorney General)*, 2006 BCSC 1368 (B.C. S.C.) at para. 26 (Hereditary Chiefs), Madam Justice Satanove noted that:

I think it must be recognized that just as [A]boriginal rights are *sui generis*, [A]boriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view [A]boriginal claims in the same light as other civil litigation. I believe effective case management of [A]boriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.

[Emphasis added by Garson J.]

[30] The Nuchatlaht's claim originally advanced in the Ahousaht litigation may go to trial after this case has been concluded. If so, given the overlapping claims, it might be that already-disclosed documents come forward that would have had a bearing on this case. That would cast doubt on the decision and in turn bring the process into disrepute. Allowing access to the documents now will avoid that risk. In short, it is preferable that this case - one of importance to the parties and the public - be decided on the fullest possible record.

[32] I would not accede to this ground of appeal.

Issue #3: Did the judge err in finding the Province had not breached its undertaking?

Positions of the Parties

[33] The Appellants say the judge erred in concluding the Province had not breached its implied undertaking by conducting a search of the Ahousaht collection prior to obtaining consent or leave of the court. While the Appellants acknowledge no application was brought to hold the Province in breach of its undertaking, they say a breach of the undertaking weighs against setting it aside. The Appellants reference Chonn at para. 25 for the proposition that using documents for internal strategic review in subsequent litigation violates the terms of the undertaking. It is no answer to say the documents "may bear" on that subsequent litigation. The Appellants also say that in finding no breach, the judge erred by:

- a) failing to consider that the Province sent an excerpt of the Ahousaht documents to a third-party expert in the Nuchatlaht litigation to assess their confidentiality;
- b) finding, without an evidentiary basis and in the face of contrary evidence, that the Province searched the documents in order to list them as privileged; and
- c) holding that the Province was required to list the documents on its privileged list in the Nuchatlaht action.

- [34] The Province says that during its search of the Ahousaht collection, it was at all times aware of the undertaking and remained faithful to it according to the guidance in Chonn. It says the solution suggested by the Appellants is unworkable, as it would require a party in possession of documents to apply to the court merely when it suspects those documents might be subject to an implied undertaking, without knowing.
- [35] The Province submits that its review of the documents consisted of searching for documents listed by the Province itself, which narrowed the 70,000 documents to 4,014. Review of those documents indicated about 8.5% of them were potentially relevant to Nuchatlaht litigation. A further search using the term "Nuch" returned some 5,833 additional potentially relevant documents. Some documents were ones produced by the Nuchatlaht but not disclosed in the Nuchatlaht litigation. The Province says the Nuchatlaht had a problem of inadequate disclosure in the Nuchatlaht litigation which the Province was continually seeking to remedy through case management conferences, oral examinations, court orders and applications, among other things. When the Province sought to list and produce the relevant documents subject to the undertaking, it raised the issue with the parties, seeking their consent. The Province points out the Nuchatlaht does not object to the use of the relevant documents in this litigation.
- [36] With respect to the third party expert, the Province says it contacted, with the consent of the Nuchatlaht, the expert who had prepared a TUS for use in the Nuchatlaht litigation with regard to TUS he had previously prepared. The Province contacted the expert seeking to clarify whether certain TUS documents were the property of the Ehattesah and confidential to them, or whether certain of the documents had been provided to the Nuchatlaht outside the litigation, such that they were not subject to the undertaking.

Analysis

- [37] I am not of the view the Province breached its undertaking. The case law relied on by the trial judge establishes that it is proper for a party in possession of documents subject to the implied undertaking to list them as privileged: see e.g., Chonn at para. 41; Tekavec at paras. 19, 31. The Province says that doing so would be impossible if the possessing party were not permitted to review the documents to ascertain which are in fact subject to the undertaking and may be relevant to the subsequent litigation. The Appellants say these cases should not be taken as establishing an obligation to list protected documents as privileged, contrary to what the judge found.
- [38] In Chonn, Justice Voith indicated that it would be both "appropriate" and "required" for a party to list those documents in its possession which are subject to the undertaking as privileged under Part 3 of its list of documents, if it had not yet obtained consent or leave to use the documents (see paras. 41, 46). In Tekavec, the court relied on Chonn and stated:

- [31] On the basis of the discussion set out here, it will follow that there is in circumstances such as these an obligation to list relevant materials which are subject to the implied undertaking. Generally, because of the special status impressed upon them by the implied undertaking and the requirement that the detail or content not be disclosed, they are to be listed as subject to privilege, that is, in Part 3 of the list.
- [39] In my view, not much turns on whether listing documents subject to the undertaking as privileged is an obligation or an entitlement, though it appears to be an obligation. It is clear from the cases cited that it is at least "appropriate" and therefore not a breach. I agree with the Province that exercising this entitlement or complying with this obligation would be impracticable if the party in possession of the documents were not permitted to review them first to identify which documents are potentially relevant and subject to the undertaking. This is especially so in a large-scale litigation like the Ahousaht litigation, in which the Province was in possession of 70,000 documents emanating from multiple sources. Moreover, a party seeking to be relieved of its undertaking must establish that the materials it seeks to use in subsequent litigation are relevant to obtain leave of the court: Tekavec at para. 13.
- [40] The Appellants also say that permitting a party in possession of documents subject to the undertaking to search them in order to list them as privileged would run contrary to Justice Voith's statement in Chonn at para. 25 that protected documents "cannot be used for internal strategic review in subsequent litigation." In my opinion, internal strategic review would involve assessing the documents to help craft arguments, spot issues, and devise litigation strategy. Indeed, the full paragraph from Chonn discusses particular ways in which parties cannot "use" documents in subsequent litigation:
- [25] A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation.
- [41] I do not believe this paragraph was intended to address an internal review conducted for the purpose of assessing which documents are potentially relevant to the subsequent litigation and protected by the undertaking.
- [42] Finally, though the Appellants say there is no evidence the Province conducted the search to list the documents as privileged, I agree with the Province that evidence demonstrates the review was for the purpose of complying with its disclosure obligations: see Appeal Book at pp. 235-36.

- [43] With respect to the third-party expert, the Province indicates it was communicating with Mr. Dewhirst to assess its compliance with its obligations pursuant to the undertaking. The Appellants say the Province inappropriately quoted from documents covered by the undertaking in communications with Mr. Dewhirst. In my preliminary view, the Province did quote from a transcript of an interview from a TUS conducted by Mr. Dewhirst in its communications with him: see Appeal Book at pp. 356-57. The Appellants say this should be considered a breach of the undertaking akin to attaching documents protected by the undertaking to an affidavit and filing it in open court, citing *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCCA 70 at para. 22. I am not sure this type of communication should be treated the same way as filing documents protected by the undertaking in open court. Mr. Dewhirst was the expert who originally prepared the TUS--he is already aware of its contents.
- [44] I also note that it is unclear whether this objection was properly raised before the chambers judge, as he does not reference it in his reasons.
- [45] In sum, I do not believe the Province breached its undertaking and I would not accede to this ground of appeal.

Disposition

- [46] In the result, I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Harris"

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