

Court of King's Bench of Alberta

Citation: Allridge v Thomson International Inc., 2025 ABKB 97

Date: 20250220
Docket: 2003 14303
Registry: Edmonton

Between:

Sydonni Allridge, as Representative Plaintiff

Plaintiff

- and -

Thomson International Inc., and ABC Corporation

Defendants

**Reasons for Decision
of the
Honourable Justice M.E. Burns**

[1] This application raises the question of the applicability of the common law implied undertaking in the context of this class action. Allridge (the representative plaintiff) seeks to adduce a transcript of the American questioning of the corporate representative in a parallel US Peterson action (the “Peterson Transcript”).

[2] Thomson International Inc., the defendant, seeks to block production of the Peterson Transcript, on the grounds that it violates the implied undertaking of confidentiality at common law. Allridge argues that codification has extinguished the common law implied undertaking of confidentiality: it now only operates as it exists in Rule 5.33 of the *Alberta Rules of Court*, and that Rule plainly does not apply to the Peterson Transcript.

[3] The parties identified three issues:

- i. Does the implied undertaking of confidentiality apply to the Peterson Transcript?
- ii. If necessary, should this Court grant relief pursuant to Rule 5.33(1)(a) to permit the use of the Peterson Transcript?
- iii. Should the Court grant permission to the applicant to rely on the Peterson Transcript as evidence on this and any future application under Rule 6.11(1)(f)?

The implied undertaking of confidentiality application

[4] The implied undertaking of confidentiality is the convention that a party receiving a document in the context of litigation is obliged to use that document only in the context of that specific piece of litigation. The implied undertaking has long existed at common law, but in Alberta, it has been codified in Rule 5.33 of the *Rules of Court*.

[5] In Canada, the common law has recognized anyone (party or solicitor) to whom a record was disclosed is subject to an implied undertaking not to use its contents for any purpose other than that particular lawsuit: *Stevenson and Côté*, *Alberta Civil Procedure Handbook 2022* (Edmonton: Juriliber) at 5-107. The Supreme Court described the substance of the implied undertaking as follows:

...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)

Juman v Doucette, 2008 SCC 8 at para 27 [*Juman*]

[6] Rule 5.33 codifies this implied undertaking in Alberta: *Makis v Alberta Health Services*, 2020 ABCA 168 at para 61 [*Makis*]. Rules 5.33(1) and (2) provide that the following must be kept confidential:

- 1) Information provided or disclosed by one party to another in an affidavit served under this Division;
- 2) Information provided or disclosed by one party to another in a record referred to in an affidavit served under this Division; and
- 3) Information recorded in a transcript of questioning made or in answers to written questions given under this Division

[7] These records or information may only be used by the recipient for the purpose of carrying on the action in which the information or record was provided or disclosed unless:

- a) the Court otherwise agrees
- b) the parties otherwise agree, or
- c) disclosure is otherwise required or permitted by law.

[8] The Alberta Court of Appeal in *Makis* suggested that the enactment of Rule 5.33 means that the common law implied undertaking is no longer operative. This comment was *obiter*—but its logic is supported by an examination of first principles.

[9] The *Alberta Rules of Court* occupy a liminal space within the legal landscape, neither statute nor common law. As the Rules are regulations passed under the authority of the *Court of King's Bench Act* and the *Court of Appeal Act*, and endorsed by the *Judicature Act*, they are “legislative in nature”: *R v Clement*, 1981 CanLII 212 (SCC). This characterization is supported by Justice Côté’s reasoning in *Reference Re: Firearms Act*, 1996 ABCA 408 at para 10, when he noted that “...the Rules of Court as they stood in 1976 were validated by [the *Judicature Act*] and have the force of an Act.” The same logic applies to the Rules as they stand in 2024.

[10] Further, if one assumes that the Rules are somewhat akin to statute, then the principles of statutory interpretation apply. It is a rule of statutory interpretation that, when a statute codifies a common law rule, the courts may conclude that the legislature intended reliance to be placed on the statute, rather than the common law rule. Otherwise, there would be no point in codifying the rule in the first place: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (21 November 2024) at 17:02, online: LexisNexis Canada.

[11] Wherever the legislature has chosen to codify the common law, it does not necessarily expressly oust the common law – but the codification “does, however, effect this end by necessary implication”: *Gendron v Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, 1990 CanLII 110 (SCC). While the Supreme Court in *Gendron* was specifically considering the common law duty of fair representation in light of its codification in the *Canada Labour Code*, the principle is broadly applicable. The legislature expresses its intentions with “irresistible clearness” when it codifies the common law. Once the legislature has spoken on a matter, the common law framework may continue to assist with interpretation—but its role is supplementary: *Tornqvist v Shenner*, 2022 ABCA 133 at para 17. The common law cannot be used to contradict the legislature’s clearly expressed intentions on a particular issue. Otherwise, codification would have no point—and this would, in turn, violate the presumption that the legislature does not legislate in vain.

[12] This is particularly the case when the codification expresses a departure from the common law position. For example, in *Collins v National Life Assurance Company of Canada*, 1995 ABCA 332 [*Collins*], the Court noted that the old Rules 169-174 differed from the common law rules on offer and acceptance. In order to respect legislative intent, the legislature’s departure from the common law was prioritized.

[13] The fact that the undertaking was codified indicates a legislative intention that Rule 5.33 should take primacy over the common law. The scope of the difference from the common law position indicates a further intention that Rule 5.33’s limited-scope undertaking should apply to litigation in Alberta.

[14] In the context of this application, Rule 5.33, the common law implied undertaking of confidentiality was broader in scope than what has been codified in Rule 5.33. Rule 5.33 is highly specific about its application and is limited to information derived pursuant to the discovery procedures in Division 1 of Part 5 of the *Rules of Court*. This means affidavits of records and questioning transcripts or responses. Rule 5.33, as written, does not apply to pleadings, exhibits attached to affidavits, or exhibits entered on the court record, because these are matters of public record. This is a more specific than the broader terms of the common law undertaking.

[15] Under this framework, the question of Rule 5.33’s applicability to the Peterson Transcript becomes clear. While a questioning transcript is certainly the *type* of document to which Rule

5.33 would apply, it does not apply to this particular document because it was generated during litigation in the United States, outside the jurisdiction this Court and its *Rules of Court*. The document plainly was not derived pursuant to the discovery procedures mandated by Division 1 of Part 5 of the *Rules of Court*. Therefore, it must fall outside the scope of Rule 5.33 and no implied undertaking of confidentiality can attach to it.

Common law implied undertaking in context of an American transcript

[16] In *Juman*, the Supreme Court noted that the United States is a common law jurisdiction which does not recognize a general implied undertaking. Under Rule 26(c) of the United States *Federal Rules of Civil Procedure*, a protective order safeguarding the confidentiality of pre-trial disclosure may be granted by the court upon a showing of “good cause”: *Juman* at para 28. However, the burden of establishing the existence of such a restrictive court order lies with the party seeking to invoke those restrictions.

[17] Thomson International’s brief, at paragraphs 28, 35, and 37, suggests that the American questioning transcript is “confidential”. It does not provide any support for this characterization and, most importantly, it does not explain what the boundaries of this confidentiality might mean. Based on Allridge’s materials, a protective order *was* granted by the US court in reference to the American action. On a plain meaning reading of the order, it seems that all materials generated in that action are to be treated as confidential—if designated as such. An affidavit of Ms. Lien Amin’s, who is an American solicitor, casts doubt on whether Thomson International followed the appropriate steps to have the transcript designated as “confidential.” However, by using the word “confidentiality,” it seems that Thomson International is trying to invoke the cover of the US court’s protective order but I find that they have failed to adduce the proper evidence to satisfy any burden.

[18] Even if the common law implied undertaking of confidentiality continues to exist and operate concurrently with Rule 5.33, the Supreme Court was clear that the common law undertaking is a promise made to a court: *Juman* at para 27. The implied undertaking of confidentiality is, at its core, a promise from a litigant to the court under whose authority the litigation is being carried out.

[19] If the Peterson Transcript is protected by an implied undertaking of confidentiality, that promise exists between the American court and the American plaintiffs, who received the transcript as part of their litigation. The Court of King’s Bench is a stranger to that promise. It is not obligated to safeguard the legitimacy and fair conduct of the litigation within the American jurisdiction. It cannot interpret what the substance of that promise means; it cannot determine when a breach has taken place; it fundamentally lacks the jurisdiction to enforce it. This is the wrong judicial venue to be deciding these issues.

[20] In the context of the application before me, Allridge seeks a declaration that the implied undertaking of confidentiality does not apply to the use of any transcript of a deposition taken in U.S. litigation related to this action, including the Peterson Transcript. Given my findings above they are entitled to that declaration. However, this does not impact the need to establish that such record is material and relevant.

[21] I note that if Thomson International is correct that the Peterson Transcript is confidential, there may be consequences to the American Plaintiffs in producing it in this action. Those

consequences flow from the American jurisdiction, in that action and any such determinations are to be made in that court, not this one.

Future Applications

[22] I have also been asked to decide if I should grant permission to Allridge to rely on the Peterson Transcript as evidence on this and any future application under Rule 6.11(1)(f).

[23] Rule 6.11(1)(f) provides:

6.11(1) When making a decision about an application the Court may consider only the following evidence: ...

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

[24] With respect to an order under Rule 6.11(1)(f) I am not prepared to make an unconditional order on all possible applications in the future as requested by Allridge. Relevance and materiality will always be live issues.

Summary

[25] In answer to the three issues raised:

- i. Does the implied undertaking of confidentiality apply to the Peterson Transcript? No.
- ii. If necessary, should this Court grant relief pursuant to Rule 5.33(1)(a) to permit the use of the Peterson Transcript? Not necessary.
- iii. Should the Court grant permission to the applicant to rely on the Peterson Transcript as evidence on this and any future application under Rule 6.11(1)(f)? No.

[26] Costs of this application go to the successful party, Allridge, in the cause as requested.

Heard on the 15th day of November, 2025.

Dated at Edmonton Alberta this 20th day of February, 2025.

M.E. Burns
J.C.K.B.A.

Appearances:

Daniel Bach, Siskinds LLP
for the Plaintiffs

Stefani Cuberovic, Siskinds LLP
for the Plaintiffs

Nicole Keeler, James H. Brown & Associates LLP
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