Date: 200807010

Docket: T-555-08

Citation: 2008 FC 858

Ottawa, Ontario, July 10, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JORGE BARREIRO et al

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER
(Re Motion for Relief from Undertaking)

I. INTRODUCTION

[1] This is a motion by the Applicants for an order granting relief from an undertaking binding on the Applicants' counsel, Martin Peters, regarding the use of certain materials disclosed to him by the Public Prosecution Service of Canada (PPSC) in proceedings before this Court in *Airth v. Canada (Minister of National Revenue – M.N.R.)* (T-1188-06).

[2] The PPSC was granted intervener status for purposes of this motion. Both the PPSC and the Respondent oppose the motion.

II. BACKGROUND

[3] In *Airth*, those applicants challenged the legality of Requirements for Information (RFIs) on much the same grounds as in the present case.

[4] During the lead-up to the hearing of the *Airth* judicial review, Mr. Peters, then co-counsel in the *Airth* case, brought a motion to allow counsel in criminal proceedings to release certain information obtained in the course of *Stinchcombe* disclosure in the British Columbia Supreme Court (BCSC).

[5] That motion did not proceed because the PPSC consented, without any apparent reference to the BCSC, to the release of the requested material. That material contained a memo which appears to be of some importance despite the pleas that it is outdated and irrelevant. Since there is some issue as to the extent to which this memo should be confidential (or sealed), the Court will say no more than that its potential relevance appears to be fairly arguable.

[6] The terms under which the documents were released are important to this motion. In a February 12, 2008 letter to the other co-counsel in *Airth*, the PPSC stated:

> "Further to our discussions on this matter, the RCMP and the federal Crown are prepared to consent to the release of edited versions of most of the material identified by Mr. Fowler and DelBigio as potentially relevant to this case. We are prepared to relieve Mr. Fowler and DelBigio of their implied undertaking, to this limited extent.
>
> Our consent is conditional on an express undertaking from you that these documents will not be used for any purpose but the captioned litigation."

The letter goes on to deal with other matters which are not relevant here.

[7] The *Airth* matter was cancelled on the very day scheduled for its hearing because the Respondent Minister withdrew the RFIs which were the basis for the litigation. The *Airth* hearing was to include oral cross-examination of the Respondent's witnesses, a somewhat unusual step in a judicial review. The motion for relief from that implied undertaking had been taken to allow counsel to put certain of this documentary evidence to the Minister's witnesses.

[8] In this current proceeding, the Applicants seek relief from the express undertaking given in the context of a Federal Court proceeding. The fact that the expressed undertaking was addressed to another co-counsel was not material to this motion, nor did Mr. Peters even raise the matter. He considered himself bound and rightly so.

[9] The Respondent takes the position that there is no mechanism for relief from an expressed undertaking; that the criminal non-disclosure obligation prevents use of the subject documents in judicial review proceedings; that there is a higher threshold for non-criminal litigation use; that

these Applicants as non-parties to the undertaking have a heavy burden in this motion; and that the documents are not relevant.

[10] The PPSC takes a somewhat similar but not identical position. The PPSC particularly focused on the express undertaking and contended that even this motion was a breach of the undertaking because it is a "use" of the documents outside the *Airth* litigation. The PPSC contended that, absent consent, there can be no relief from an expressed undertaking.

III. ANALYSIS

[11] There was some argument that counsel for PPSC knew and had implicitly consented to the use of the documents in this case. However, given the uncertainty surrounding whether and when this motion would be brought, counsel's failure to object prior to the motion being filed cannot be taken as consent.

[12] There is a specific contention that the Applicants' counsel acted improperly in bringing this motion. Questions as to professional conduct are matters for the provincial law societies; however, from this Court's perspective, the only way in which counsel could obtain relief from the expressed (or even an implied) undertaking for use of these documents is by consent or by motion. For reasons later expressed, I reject the absolutist argument that a motion for relief from an expressed undertaking cannot be brought. I can see no alternative to Mr. Peters' position as counsel knowing that evidence exists which may assist his client and yet bound by an undertaking as an officer of this Court.

[13] The disclosure of information in accordance with *Stinchcombe* does not, in and of itself, cloak the information with a seal of confidentiality. All of the accused would have had access to the information. The Respondent concedes that the information in issue is "out there" – I take to mean it is somewhat known in the interested community. The objection is to the use of the document and the use of the information in the document.

[14] In my view, the Supreme Court's decision in *Juman v. Doucette*, 2008 SCC 8, establishes the basic principles with respect to undertakings of confidentiality in the context of litigation. In particular, paragraph 30 is apt:

> The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:
>
> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
>
> In such an application the judge would have access to the documents or transcripts at issue.

[15] I do not think that the case of *Witten v. Leung* (1983), 25 Alta L.R. (2d) 257 (relied on by the Respondent) is at all binding on this Court nor is it persuasive. In that case, counsel's undertaking

was part of a trust arrangement in the context of a commercial transaction. While the undertaking was binding, it was so because it was primarily contractual in nature. Therefore, the contract could not be amended unilaterally nor did the court there see any way for relief from a contractual obligation.

[16] The undertaking with respect to use of documents in court transcends commercial issues (indeed the PPSC has no title in the documents) and the overriding considerations are the interests of justice. The express undertaking is of a like character.

[17] The PPSC's absolutist position that there can never be relief from an express undertaking of counsel ignores that the overriding consideration must be the interests of justice. It would elevate the counsel's undertaking beyond even the principle of solicitor-client confidentiality.

[18] In this instance, one branch of the federal Crown (albeit an independent branch), which had consented to the use of the same material in a similar case in this Court, would prevent its use in this present case - to the presumed advantage of another arm of the federal Crown. The federal Crown cannot control the evidence in this case in this manner. Absent some showing of real prejudice, I fail to see how this can be in the public interest.

[19] Neither the Respondent nor the PPSC have shown any real prejudice from disclosure or release from the undertaking. The arguments about prejudice are speculative. There is no evidence that some prejudice has arisen since consent to use the documents was given in the *Airth* case.

Therefore, in terms of balancing interests, relief from the undertaking and a full hearing on the merits of the case outweigh any reason not to grant relief.

[20] While this is a case of an express undertaking rather than the implied undertaking which more commonly arises, I see no rationale for a different approach to relief from the undertaking. The substance of an undertaking is just as binding when it is implied as when it is stipulated in court rules or expressed between counsel.

[21] Although this is an issue of an expressed undertaking, the Respondent and PPSC say that it is also governed by the implied undertaking rule. To the extent that these documents are covered by an implied undertaking not to be used for purposes other than the criminal litigation, it is not an undertaking exclusively to the BCSC. In fact, the PPSC was able to waive the undertaking in the *Airth* case without approval from the BCSC. As *Juman* makes clear, it is an undertaking by the parties as between the parties but given to the Court. However, relief from the undertaking does not require the specific consent of the BCSC.

[22] I have noted that the documents (or in this specific case, a memo) were already before this Court in *Airth*. The express undertaking arose in the context of that case. Therefore, as to the question of whether this Court can and should deal with this motion, it is entirely appropriate that this Court deal with this issue and its relevance to this case (see also *Canada v. Ichi Canada Ltd.*, [1992] 1 F.C. 571).

[23] Although the Applicants are non-parties to the undertaking and, as the Respondent argued, there is a heavier burden to satisfy in obtaining relief, that burden has been met. The material is the same as that which was available in *Airth* and the interests of a fair and complete hearing justify relief.

[24] As to the issue of relevance, probative value and the like, the Applicants will still have to make out those aspects of proof. There is sufficient indication of potential relevance to justify the relief requested but that does not resolve other aspects of the evidentiary issues concerning the documents.

[25] Therefore, this motion is granted. Costs shall be in the cause.

ORDER

THIS COURT ORDERS that this motion is granted. Counsel for the Applicants is relieved of his undertaking only to the extent that the relevant materials disclosed by the Public Prosecution Service of Canada in *Airth v. Canada (Minister of National Revenue – M.N.R.)* (T-1188-06) may be used in this proceeding.

Costs shall be in the cause.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-555-08
STYLE OF CAUSE:	JORGE BARREIRO et al and MINISTER OF NATIONA REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 25, 2008
REASONS FOR ORDER AND ORDER:	Phelan J.
DATED:	July 10, 2008

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Mr. Bruce Harper	FOR THE PUBLIC PROSECUTION SERVICE OF CANADA

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