

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Knight v. Imperial Tobacco Canada,***
2009 BCSC 339

Date: 20090313
Docket: L031300
Registry: Vancouver

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Between:

Kenneth Knight

Plaintiff

And

Imperial Tobacco Canada Limited

Defendant

And

Her Majesty the Queen in Right of Canada

Third Party

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:

David A. Klein
N. Hartigan

Counsel for the Defendant:

N. Roberts
B.B. Olthuis

Counsel for the Third Party:

Rodney L. Hayley
M. Vesely
C. Dafoe

Date and Place of Trial/Hearing:

March 6, 2009
Vancouver, B.C.

[1] The plaintiff applies for an order that the defendant produce its list of documents forthwith. The defendant applies for an order that effectively seeks protection from publication of any documents it produces, but particularly those documents which it has deemed to be confidential and proprietary.

[2] Counsel for the defendant advises that in June 2007 they had listed 20,302 documents of which 6,345 were considered by it to be confidential. The plaintiff shall have its order that a list of the 20,302 documents be produced within twenty one days. The defendant also advises that a further approximately 20,000 documents have been reviewed and found relevant, but have not been reviewed for privilege. A list of these documents shall be produced to the plaintiff within sixty days.

[3] The order requiring the production of the above mentioned list of documents shall also contain terms by which the confidentiality of some of these documents may be preserved.

[4] The first term sought by the defendant is that all documents produced in the litigation be subject to an express undertaking that they be kept in confidence by the parties and used solely for the purposes of this action. Specifically, the defendant seeks an order that if the documents, or any portion thereof, or any information contained therein shall be disclosed to anyone other than the solicitors of record, their partners and associates, secretarial and paralegal assistants, law students and other employees, then those other persons must execute and deposit with the

solicitors of record a written undertaking indicating their agreement to be bound by the terms of the order and subject to the jurisdiction of this Court.

[5] The plaintiff objects to these terms on the grounds that the defendant has not established exceptional circumstances that would require the implied undertaking, that pertains to all litigation in British Columbia, to be replaced with an express undertaking of this nature. The plaintiff relies on the decisions of ***Juman v. Doucette***, 2008 SCC 8, [2008] 1 S.C.R. 157, and ***Doucette v. Wee Watch Daycare Systems Inc.*** 2006 BCCA 262, 269 D.L.R. (4th) 654. These decisions and the decisions of ***Hanson v. Keystone Ford Sales Ltd.*** (1996), 138 D.L.R. (4th) 767, 49 C.P.C. (3d) 1 (Man. C.A.), and ***Parsons v. McDonalds Restaurant of Canada Ltd.*** (2003), 179 O.A.C. 260 (S.C.J.), stand for the proposition that the implied undertaking is an all encompassing rule created to protect the privacy interests of all litigants, and only in cases of exceptional prejudice should an express confidentiality order be made.

[6] The defendant argues that exceptional circumstances do exist in this case in that the nature of the litigation is high profile, of a political nature and may attract the attention of people who will endeavour to get hold of the documents for abusive reasons. The defendant also submits that there is less risk of inadvertent disclosure if lay people are required to sign a written undertaking.

[7] Although there is some material in the affidavit of Susan Smith to suggest that certain organizations have mounted an internet campaign against the tobacco companies, there is no specific evidence of any misuse of documents from this or

any other tobacco litigation. The cases in which an express confidentiality order has been made appear to involve trade secrets, intellectual property, competing trade litigants or large government organizations. No such element of risk appears in the case before me. Plaintiff counsel has advised that the only persons to whom they will be disclosing the documents are the plaintiff representatives and their expert witnesses.

[8] At this stage of the litigation, the third party claim against Her Majesty the Queen in Right of Canada has been struck and therefore there is no concern regarding a large government body over which it is difficult to control dissemination of information. Should the third party rejoin this litigation different considerations may apply.

[9] I agree with counsel for the plaintiff that to issue a confidentiality order in this case would be to suggest that the implied undertaking rule is deficient or that litigants in other cases where there is no express undertaking have a less stringent obligation upon them.

[10] Therefore, I decline to grant as a term of the order for production of documents, the terms sought in paragraphs 2 – 11 of the draft order attached to the defendant's Amended Notice of Motion.

[11] The next term that the defendant seeks is a procedure for filing information which it deems confidential and proprietary in court during the pre-trial and trial process. The plaintiff's simple and reasonable proposal is that it will serve on the defendant seven days before filing any applications in court attaching any of the

defendant's documents or information from documents of the defendant. The defendant can then take whatever steps are necessary to seek a sealing order for any of the material proposed to be filed by the plaintiff. This seems a sensible approach and the order for production of documents shall contain this seven day notice provision.

[12] There appears to be no dispute between the parties regarding the destruction and return of the documents after trial so the terms proposed by the defendant should also be included in the order for production of documents.

[13] Finally, there was some discussion as to how the documents over which confidentiality is claimed by the defendant should be marked. If counsel cannot agree as to how this term should be expressed in the order, they are at liberty to return.

“The Honourable Madam Justice Satanove”