

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *AG Growth International Inc. v. AGT Food
and Ingredients Inc.*,
2026 BCCA 341

Date: 20260813

Dockets: CA51038; CA51039; CA51040; CA51041
CA50142; CA51043; CA51044

Docket: CA51038

Between:

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Appellants
(Defendants)

And

**AGT Food and Ingredients Inc., AGT Foods Switzerland SA and
Alliance Pulse Processors Inc.**

Respondents
(Plaintiffs)

And

Pederson Management

Respondent
(Third-Party)

- and -

Docket: CA51039

Between:

Fibreco Export Inc.

Appellant
(Defendant)

And

**AGT Food and Ingredients Inc., AGT Foods Switzerland SA and
Alliance Pulse Processors Inc.**

Respondents
(Plaintiffs)

- and -

Docket: CA51040

Between:

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Appellants
(Third-Party)

And

Fibreco Export Inc.

Respondent
(Plaintiff)

And

Marsh Canada Limited/Marsh Canada Limitee, and Thomas Liu

Respondents
(Defendants)

- and -

Docket: CA51041

Between:

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Appellants
(Defendants)

And

Fibreco Export Inc.

Respondent
(Plaintiff)

And

Marsh Canada Limited/Marsh Canada Limitee, and Thomas Liu

Respondents
(Third Parties)

- and -

Docket: CA51042

Between:

Fibreco Export Inc.

Appellant
(Plaintiff)

And

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Respondents
(Defendants)

And

Marsh Canada Limited/Marsh Canada Limitee, and Thomas Liu

Respondents
(Third Parties)

- and -

Docket: CA51043

Between:

Fibreco Export Inc.

Appellant
(Defendant)

And

Marsh Canada Limited/Marsh Canada Limitee, and Thomas Liu

Respondents
(Defendants)

And

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Respondents
(Third Parties)

- and -

Docket: CA51044

Between:

**AG GROWTH INTERNATIONAL INC. dba WESTEEL CANADA,
also dba AGI WESTEEL, also dba AGI UNION IRON, WESTEEL CANADA
also dba AGI WESTEEL, UNION IRON, INC., also dba UNION IRON,
also dba AGI UNION IRON**

Appellants

And

**AGT Food and Ingredients Inc., AGT Foods Switzerland SA and
Alliance Pulse Processors Inc.**

Respondents
(Plaintiffs)

And

Fibreco Export Inc.

Respondent
(Defendant)

Before: The Honourable Justice MacNaughton
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
September 8, 2025 (*AGT Food and Ingredients Inc. v. Fibreco Export Inc.*,
2025 BCSC 1744, Vancouver Dockets S215438, S216895, S218900 and S235258).

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Place and Date of Hearing:

Vancouver, British Columbia
July 20, 2026

Place and Date of Judgment:

Vancouver, British Columbia
August 13, 2026

Summary:

The appellants seek leave to appeal an order for production of documents relating to a settlement agreement between them. They contend the case management judge erred in granting the order by failing to apply the proper framework for implied waiver and disclosure of solicitor-client privileged documents.

Held: Application for leave to appeal is granted. The interests of justice support granting leave given the merits of the appeal and importance to the practice and proceedings.

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STAY OF PRODUCTION ORDERS	[42]

Reasons for Judgment of the Honourable Justice MacNaughton:

Nature of the Application

[1] Fibreco Export Inc. (“Fibreco”) and AG Growth International Inc. and related companies (collectively “AGI”), the appellants, seek leave to appeal an order compelling them to produce documents under R. 22-1(4)(c) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*]. If leave is granted, the appellants also seek a stay of the production order pending the outcome of the appeal.

[2] As Fibreco filed its application and application book one day after the time for doing so expired, it also requires an extension of time. The respondents did not object to the extension as they were not prejudiced by it. I granted the extension.

[3] AGT Food and Ingredients Inc. and related companies (collectively “AGT”), and Marsh Canada Limited/Marsh Canada Limitee and Thomas Liu (collectively “Marsh”), the respondents, oppose leave to appeal on the basis that the judge properly applied the framework for ordering production, and the appeal would create undue prejudice and delay.

[4] For the reasons that follow, the appellants have established sufficient merit to warrant granting leave to appeal. The appeal would not create undue prejudice or further delay resolution of this complex litigation as, although it is set for a 100-day trial in April next year, it is unlikely to proceed as currently scheduled. Amendments to pleadings are being sought that would result in another exchange of responsive pleadings, which would likely jeopardize the current trial dates, and an expedited appeal date has been reserved.

[5] Accordingly, the applications for leave to appeal should be allowed. As the order appealed from involves disclosure of documents protected by solicitor client privilege, I would also grant a stay of the order pending the appeal.

Background**The Actions**

[6] These applications arise in the context of a number of legal actions filed after the September 11, 2020 collapse of one of the newly-constructed agriproducts silos at Fibreco's marine terminal facility in North Vancouver. AGT entered into a long-term agreement with Fibreco to use the silos to ship its agriproducts, and the agreement enabled Fibreco to proceed with construction of the silos.

[7] Fibreco worked with AGI, to engineer, manufacture, and construct the silos. Marsh was the insurance broker for Fibreco and had sourced a series of policies for the construction and operation of the silos. After the collapse, Fibreco sought insurance coverage. Coverage was largely denied on the basis that Marsh had terminated the construction coverage before the collapse.

[8] The collapse of the silo in 2020 resulted in a series of actions, counterclaims, and third-party claims between the parties. The amounts in issue are significant.

Resolution Attempts

[9] In May 2023, the parties attempted a largely unsuccessful mediation.

[10] On June 14, 2023, AGI and Fibreco met in Chicago with a view to settling the issues between them, and certain terms were discussed that would eventually lead to settlement.

[11] On June 20 and 21, 2023, meetings were held between counsel for and representatives of Fibreco and AGI. Fibreco's counsel screen-shared a draft agreement with AGI.

[12] On June 22, 2023, at a meeting held in Vancouver, involving representatives of all the parties, the Executive Chair and CEO of Fibreco informed AGT's president that AGI and Fibreco had reached a settlement. Later at the same meeting, Fibreco's counsel confirmed the settlement.

Seeking Settlement Specifics

[13] Counsel for Marsh and AGT sought specifics of the settlement. No specifics or documents were provided, nor was the settlement expressly denied. On June 27, 2023, AGI advised that it had entered into a framework agreement with Fibreco on June 22, 2023, with the terms to be finalized.

[14] On June 28, 2023, Fibreco and AGI negotiated a common interest privilege agreement (“CIPA”), which was backdated to June 14, 2023. The CIPA states AGI and Fibreco agreed to “cooperate” in the ongoing litigation.

[15] On July 20, 2023, at a judicial management conference, counsel for Fibreco advised the assigned case management judge (“CMJ”) that a settlement had been reached between Fibreco and AGI resolving all the claims except AGI’s third-party claim against Marsh. On July 27, 2023, the settlement agreement was finalized, executed, and dated effective as of June 22, 2023 (the “SA”).

[16] On August 1, 2023, Fibreco notified AGT and Marsh of the SA and offered to disclose it subject to confidentiality regarding amounts. On August 14, AGT and Marsh agreed to respect the confidentiality of the redacted SA, and on August 15, it was sent to them.

[17] On August 29, 2023, for the first time, counsel for Fibreco disclosed the CIPA to AGT and produced it the following day. On November 21, 2023, AGT filed an application alleging that Fibreco and AGI’s failure to disclose the SA and the CIPA in a timely manner amounted to an abuse of process and sought to strike Fibreco and AGI’s pleadings. Marsh filed a similar application in June the following year.

[18] The relief sought by AGT and Marsh included striking Fibreco and AGI’s pleadings, with document production in the alternative. As the CMJ made clear, AGT and Marsh do not plead or rely on actual prejudice or say that they were misled as a result of Fibreco’s nondisclosure of the CIPA and SA.

[19] Key to the success of the abuse of process allegations is the date on which there was agreement to the CIPA and the SA, as it is from that date the obligation to disclose arose.

[20] AGT's application was first heard in January 2024. It sought adverse inferences against Fibreco and AGI.

[21] On January 18, 2024, Fibreco, with AGI's support, sought an adjournment to adduce evidence in response to the adverse inferences. The CMJ granted the adjournment. Evidence about the circumstances, time and terms of, the SA and CIPA was adduced through affidavits sworn by Fibreco's counsel and CEO, as well as the senior vice president and counsel for AGI (the "Affidavits"). Fibreco and AGI relied on the settlement privilege exception discussed in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 when adducing this evidence.

[22] AGT and Marsh brought applications under R. 22-1(4) for production of a significant number of documents on the basis that, AGI and Fibreco had waived privilege as a result of filing the Affidavits, and their content.

CMJ's Order

[23] The application for production of documents, relating to AGT and Marsh's abuse of process claims, was heard by the CMJ in April 2025. Fibreco cross-applied for production of documents from AGT and Marsh. Reasons for judgment were released on September 8, 2025, and indexed as 2025 BCSC 1744 [RFJ].

[24] Under R. 22-1(4)(c) of the *Civil Rules*, a court may "give directions requiring discovery, inspection, or production of a document or category of [documents]" relevant to an application.

[25] Citing *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2014 BCSC 1560, the CMJ concluded that the just resolution of litigation may require disclosure of communications, and that settlement and common interest privilege must give way in those cases. Rule 22-1(4)(c) also applied to privileged

documents where abuse of process is claimed. Fibreco and AGI opposed the production application on the basis that AGT and Marsh had not established a *prima facie* abuse of process claim: RFJ at paras. 63–67.

[26] Turning to the abuse of process claim, the CMJ was cautious in his analysis noting that a proper consideration of the abuse of process claim would occur at a full hearing scheduled in the future. Nevertheless, the judge found Fibreco and AGI’s actions in reaching the SA had impacted the litigation landscape, one of the considerations relevant to an abuse of process claim. For example, the SA created an economic stake for AGI in Fibreco’s litigation against AGT and resulted in AGI adopting facts contrary to its pleadings: RFJ at paras. 68–83.

[27] Together with changing the litigation landscape, the CMJ noted there were questions about the timeliness and sufficiency of disclosure of the SA. Viewing the submissions together, they found that a *prima facie* case for abuse of process was made out. This finding was based on Fibreco and AGI: entering into a CIPA to “cooperate”; settling their litigation against each other by June 22, 2023; not disclosing the settlement agreement “immediately”; changing the litigation landscape significantly with their actions; and unqualifiedly advising the principal parties at the June 22, 2023 meeting that Fibreco and AGI had settled. Notwithstanding this finding, the CMJ was careful to note there were a series of outstanding issues with respect to the abuse of process claim that would more appropriately be addressed at the full hearing: RFJ at paras. 91–95.

[28] Fibreco and AGI raised privilege as a basis for opposing the application for production of documents. The CMJ found the assertion of settlement privilege was not sustainable as these parties had already disclosed much of the evidence in order to respond to the adverse inferences being sought against them. Given the voluntary nature of the disclosure, the judge held there was an implied waiver, and fairness required disclosure of sufficient documents to allow the evidence of Fibreco and AGI’s primary deponents to be tested. The judge also found the effort to prepare and produce the evidence to date meant the documents sought had likely been identified

and catalogued, and the relative stakes of the dispute, along with the voluntary disclosure to date, justified disclosure. Accordingly, the CMJ ordered disclosure of a range of documents including those related to the formation of the SA and the CIPA and the June 22, 2023 meeting. The judge also ordered disclosure of communications between counsel around the times when both agreements were formed: RFJ at paras. 96–105.

[29] With respect to Fibreco and AGI's cross application for disclosure from AGT and Marsh, the CMJ again found the documents were relevant and the prejudice and cost from production did not outweigh the disclosure sought. Fairness in the proceedings also supported disclosure, particularly because they made a disclosure order against Fibreco and AGI: RFJ at paras. 106–130.

Leave to Appeal

Legal Framework

[30] As production of documents was ordered under R. 22-1(4)(c), the CMJ's order is a limited appeal order under R. 11 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 requiring leave to appeal. Under s. 31 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [Act] a justice of this Court may grant or refuse leave to appeal, and if granted, may limit the grounds of the appeal. In determining whether to grant leave to appeal, the relevant factors to consider are set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers):

- 1) whether the point on appeal is of significance to the practice;
- 2) whether the point raised is of significance to the action itself;
- 3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- 4) whether the appeal will unduly hinder the progress of the action.

[31] The onus rests on the party applying for leave to establish these factors are met, and the factors are to be considered under the rubric of the interests of justice: *B.C. Teachers' Fed. v. B.C. (A.G.)* (1994), 4 B.C.L.R. (2d) 8 at 11, 1986 CanLII 1089 (C.A.) (Chambers); *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

[32] As the parties acknowledge, an order granting production of documents is a discretionary order that is owed significant deference on appeal. In addition, the order in this case was made by the CMJ who has been involved in managing the litigation over the numerous procedural stages and is well-acquainted with the subject matter, the nature of the dispute, the parties, and their litigation stances. Accordingly, great deference is owed to the CMJ's factual findings.

[33] Although leave to appeal will rarely be granted with respect to discretionary orders, for the reasons that follow, I am satisfied that leave should be granted in this case.

Significance to the Practice and the Litigation

[34] The point on appeal is one of significance to the practice. The Supreme Court of Canada has consistently emphasized the breadth and primacy of solicitor-client privilege: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 24. Thus, the circumstances in which implied waiver is found are important to the practice and significant in this case. The appeal may deal with the broader policy implications of the possible chilling effect of the CMJ's disclosure order on settlement of complex legal and factual litigation.

Prima Facie Merits

[35] The threshold for leave to appeal has been described as "[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny" by this Court: *Johnston v. Matheson* (also referred to as *A.L.J. v. S.J.M.*) (1994), 46 B.C.A.C. 158 at para. 10, 1994 CanLII 2614 (C.A.), (Chambers) and, more

recently as “relatively low”: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Chambers).

[36] This appeal raises questions about whether the CMJ exercised their discretion under R. 22-1(4) on correct legal principles. The CMJ did not cite this Court’s decision in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, a leading case on implied waiver, nor the associated line of cases which outline the circumstances in which implied waiver will be found. Further, to the extent the CMJ relied on *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 [*Handley*] for the elements of abuse of process, it was overturned by a five-justice division in the Ontario Court of Appeal in *1086289 Ontario Inc. (Urban Electrical Contractors) v. Welland (City)*, 2026 ONCA 352 [*Welland*]. Although *Welland* came out following the CMJ’s decision, there remains merit to this Court considering the impact of the decision on the CMJ’s reliance on *Handley*.

[37] The appeal of the order also raises questions about whether the judge sufficiently explained how the evidence adduced by Fibreco and AGI, after seeking an adjournment of the abuse of process application, justified the scope of waiver determined by the CMJ and their broad disclosure order. This question does not appear to have been raised or answered in other waiver of privileges cases from this Court.

Undue Hindrance

[38] The scheduled trial of this matter is over ten months away, and the appeal is being sought on an expedited basis. An October date has been obtained for the purposes of the appeal.

[39] As noted above, there are other procedural matters that may result in an adjournment of the trial currently scheduled in April 2027. These include an application to amend pleadings in October that, if allowed, may well require revised responsive pleadings, further disclosure, and possibly further discovery. Therefore, any delay created by the appeal will not result in an undue hindrance on the action.

Interests of Justice

[40] For the foregoing reasons, I conclude that it is in the interest of justice to grant leave to appeal.

Stay of Production Orders

[41] Under s. 30(c) and 33 of the *Act*, a justice sitting in chambers may make an interim order to prevent prejudice to a party, including granting a stay of all or portions of proceedings that form the basis for the appeal being brought.

[42] As I have acceded to the appellants' arguments that leave to appeal should be granted; I also grant a stay of the production order pending resolution of the appeal. This stay reflects the importance of solicitor-client privilege and the determination of the scope of disclosure.

"The Honourable Justice MacNaughton"