

*Indexed as:*

**Birch Builders Ltd. v. Esquimalt (Township)**

**Between**

**Birch Builders Ltd. and 351994 B.C. Ltd., Plaintiffs, and  
Corporation of The Township of Esquimalt, W. Ronald Warder,  
Colin Blair, James King, Norman Taping and Christopher  
Clement, Defendants**

[1993] B.C.J. No. 1778

Victoria Registry No. 89 1638

British Columbia Supreme Court  
Victoria, British Columbia  
(In Chambers)

**Shabbits J.**

Heard: April 1, June 16 and August 13, 1993.

Judgment: August 16, 1993. Filed: August 18, 1993.

(17 pp.)

*Practice -- Production of documents -- Privilege -- Solicitor-client privilege -- Waiver -- Effect of voluntary partial or full disclosure.*

Application for production and inspection of documents. On November 2, 1988, certain property located in the municipality was rezoned. The applicants sought production of: (1) all legal opinions received by the defendant municipal corporation relating to the rezoning of the property; and (2) a summary of the rezoning proceedings provided to the defendant by its solicitor. The application was opposed by the defendants who claimed that all the documents were subject to solicitor-client privilege. There was evidence that four of the said legal opinions which totalled seven in number was partially disclosed by some of the defendants during their examination for discovery in another action also taken against them by the plaintiff. The summary of the proceedings, on the other hand, had been delivered to the editor of the local newspaper.

HELD: Application was allowed in part. Production of the four legal opinions and the summary for

which there had been voluntary disclosure by the defendants was ordered. The effect of such disclosure was to waive such solicitor-client privilege as may have attached to the said opinions and summary.

**STATUTES, REGULATIONS AND RULES CITED:**

British Columbia Supreme Court Rules, Rule 18A, 26(1), 26(12).

Criminal Code, R.S.C. 1985, c. C-46, s. 122.

Municipal Act, s. 745.1.

Counsel for the Plaintiffs: John L. Finlay.

Counsel for the Defendants: F. Timothy Williamson.

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**1 SHABBITS J.:**-- This is an application by the plaintiffs for an order requiring the production and inspection of documents. The application is made pursuant to Rule 26(1).

**2** The plaintiffs seek production of the documents referred to in the notice of motion filed December 24, 1991.

**3** The notice of motion seeks production of any legal opinions received by the defendant Corporation of the Township of Esquimalt ("Esquimalt") relating to the November 2, 1988 rezoning of property identified in these proceedings as Plaskett Place. The evidence before me is that no such documents exist.

**4** The notice of motion seeks production of a copy of any request from a solicitor to Mr. Sandy Gray, the Clerk-Administrator of the defendant Esquimalt, asking for production of the document identified in these proceedings as defendants' document No. 72. In the affidavit of Mr. Gray filed June 16, 1993, Mr. Gray avers that there is no letter from the Municipality requesting Mr. Gray to produce defendants' document No. 72. Although the notice of motion refers to a request from a solicitor to Mr. Gray, not a request from the Municipality, there is no evidence that there was such a request emanating from any source. The plaintiffs may wish further clarification from the defendants that this document is non-existent. The defendants do not claim that there is any such document subject to solicitor-client privilege.

**5** On June 19, 1989 Mr. Warder, as Mayor of Esquimalt, wrote Mr. Jacques Pleasance of the Esquimalt News. He enclosed what he described as "a summary of the Plaskett Place proceedings provided by our Solicitor". The defendants have disclosed and produced the letter of June 19, 1989 to the plaintiffs. The enclosure has not been produced. Both Mr. Warder and the defendant Esquimalt on whose behalf Mr. Warder wrote, were holders of any right of privilege in respect of

the enclosures. The disclosure of this information to Mr. Pleasance constitutes waiver of privilege. The disclosure was given to Mr. Pleasance on the basis that he was free to have the contents published in the Esquimalt News. The application before me proceeded on the basis that a determination should be made whether that enclosure is the subject of solicitor-client privilege. I hold that any privilege which attached to the enclosure has been waived. I order that the defendants W. Ronald Warder and Esquimalt produce the enclosure to Mr. Warder's letter of June 19, 1989 for inspection by the plaintiffs.

**6** The defendants say that the application otherwise relates to the following documents, all of which are subject to solicitor-client privilege:

1. Letter of Wilson, Staples, McDannold & Marley, dated January 5, 1989, with its enclosures ("Document No. 1");
2. Letter from Wilson, Staples, McDannold & Marley, dated April 14, 1989, with its enclosures ("Document No. 2");
3. Letter from Wilson, Staples, McDannold & Marley, dated April 18, 1989, with its enclosures ("Document No. 3");
4. Letter from Lidstone, Young, Anderson dated May 1, 1989 ("Document No. 4");
5. Letter from Wilson, Staples, McDannold & Marley, dated June 21, 1989 ("Document No. 5");
6. Letter from Lidstone, Young, Anderson dated June 28, 1989 ("Document No. 6"); and
7. Letter from Wilson, Staples, McDannold & Marley, dated July 6, 1989 ("Document No. 7").

**7** The defendants object to the production of the documents which they concede exist and which I have identified as being Documents 1 to 7. First, it is submitted that these documents are not of relevance to the issues raised in these proceedings. Second, it is submitted that if of relevance, they are subject to solicitor-client privilege.

**8** The statement of claim includes several causes of action. The plaintiffs claimed in negligence. This cause of action was struck out pursuant to a Rule 18A judgment. The plaintiffs' appeal against that judgment has been heard and was dismissed.

**9** The remaining causes of action, as against one or more of the defendants, include allegations of acting in bad faith, of acting in abuse of a public office, of acting for an improper purpose, of acting with malice towards the plaintiffs and of acting in conflict of interest.

**10** It is common ground that the defendants acted following their receipt of the legal opinions in respect of which solicitor-client privilege is claimed. I have inspected these documents, pursuant to Rule 26(12), and I have determined that these documents do relate to issues raised in the pleadings. These documents may be relevant. Their relevance will be for the trial judge to determine.

**11** Mr. Justice Anderson, in *Langlois v. Ordorfer and Ordorfer* (1978), 6 B.C.L.R. 260 at p. 262, said:

Relevance will depend on the view taken by the court of the plaintiff's evidence in the light of all other evidence, including expert testimony, as related to the claim for damages.

**12** I will not refuse the plaintiffs' application for production on the basis Documents Nos. 1 to 7 are not of relevance to the issues raised in these proceedings.

**13** Documents Nos. 1 to 7 may be divided into three groups, for the purpose of considering solicitor-client privilege.

**14** Document No. 1 is the legal opinion of Lorena P.D. Staples, a barrister and solicitor of the firm Wilson, Staples, McDannold & Marley. This opinion relates to the proceedings later heard before Mr. Justice Gow on March 23, 1989.

**15** The second group of documents are those identified as Documents Nos. 2, 3 and 4. Document No. 2 is a legal opinion of J. Galt Wilson, Q.C.; Document No. 3 is a legal opinion of Guy E. McDannold; and Document No. 4 is a legal opinion of Raymond E. Young. All three of those persons are barristers and solicitors, and all three gave legal opinions in respect of the proceedings later heard before Mr. Justice Gow, which resulted in his decision delivered June 16, 1989.

**16** The third group of documents are those numbered 5, 6 and 7. Documents Nos. 5 and 7 are legal opinions of J. Galt Wilson, Q.C. and Document No. 6 is a legal opinion of Mr. Raymond E. Young, also a barrister and solicitor. These three legal opinions were given subsequent to the decision of Mr. Justice Gow delivered June 16, 1989.

**17** I am of the view that all seven documents, at the time they were written and delivered to the defendants, were subject to solicitor-client privilege. All seven documents were provided to each of the defendants. Each of the defendants is entitled to the benefit of the privilege. It is the submission of the plaintiffs that that privilege has now been lost and no longer extends to these communications.

**18** The plaintiffs submit that the state of mind of the defendants, and each of them, is in issue in these proceedings and that the defendants have put their state of mind in issue. The plaintiffs say the defendants rely on the legal advice they received. The plaintiffs submit that in doing so, the defendants have waived the privilege previously accorded the documents. The plaintiffs refer to *Roger et al. v. Bank of Montreal et al.*, [1985] 4 W.W.R. 508; *Lapointe et al. v. Minister of Fisheries and Oceans et al.*, [1987] 1 F.C. 445; and *Hunter et al. v. Rogers*, [1982] 2 W.W.R. 189.

**19** These cases hold that a party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind and, in doing so, uses as a

reason for its conduct the legal advice it has received.

**20** The defendants' pleadings do not waive solicitor-client privilege. Although the defendants deny they had the state of mind attributed to them in the statement of claim, their statement of defence does not allege that they acted pursuant to legal advice they received.

**21** The plaintiffs further submit that the defendants have, in respect of one or more of the documents of which production is sought, disclosed material parts of the documents and, accordingly, have been deemed to waive the privilege in respect of the whole of such documents. The plaintiffs refer to *Frind v. Sheppard*, [1940] O.W.N. 135.

**22** Document No. 1 was distributed to the Mayor and Aldermen of the defendant Esquimalt with a letter from Mr. Gray dated January 6, 1989. That letter has been produced to the plaintiff and is identified in these proceedings as defendants' Document No. 82. In defendants' Document No. 82, Mr. Gray briefly summarized Ms. Staples' opinion as follows:

She notes that every legislative body has the duty to defend its statutes or bylaws when attacked in a Court of Law.

**23** The second group of documents were received by the defendant Esquimalt prior to the second hearing before Mr. Justice Gow. Defendants' Document No. 91, which is a letter from the Mayor of the defendant Esquimalt to the members of its Council, is dated April 24, 1989. This letter was written after Documents Nos. 2 and 3 were received by the defendant Esquimalt. Document No. 91 was produced by the defendants to the plaintiffs in these proceedings. Document No. 91 summarizes the legal advice the defendant Esquimalt received in respect of the position it ought to take on the second hearing before Mr. Justice Gow, as follows:

Regardless of the preceding argument, I cannot ignore the advice of our Solicitors which makes it very clear that we should reopen the case and argue for upholding the bylaw in light of the new evidence. They specifically state "only by proceeding in this manner would you be discharging your duty to the Corporation."

**24** The plaintiffs submit that the solicitor-client privilege attaching to Documents Nos. 1 to 4 was waived by evidence given on discovery.

**25** At least two of the defendants referred to the legal advice they had received when testifying as to the position the defendant Esquimalt took before Mr. Justice Gow. This discovery evidence included the following:

The evidence of the defendant W. Ronald Warder at his examination for discovery of August 21, 1990 included the following:

235.

Q. That's right.

A. After hearing, when Council finally decided on the matter and hearing all the opinion we had available to us, if I get the sequence correct here, I supported Council's final decision, I believe.

236. Q. Which was that Mr. McDannold should take no position as to the validity or invalidity of the bylaw?

A. That's my recollection, yes.

237.

Q. And why did you support that?

A. Based on the information we had and the advice from our solicitors, it seemed to me to be the most prudent way to go, given the nature of the issue.

...

244. Q. And so that I'll be clear, it wasn't other opinions; it was the opinion of Lidstone Young; is that correct?

A. No, my decision was based on opinions from both firms.

245.

Q. Both Mr. Wilson's firm and Lidstone Young?

A. That's correct.

At an examination for discovery on July 18, 1990, the defendant Christopher Clement testified as follows:

568. Q. And, was this something that it was your view should be brought before the Court so that the bylaw might be held to be valid?

A. I don't know, honestly. My recollection is that Council decided to take no action in that regard; I would assume that I was supportive of that action.

569.

Q. And, why was that?

A. I don't specifically recall. I believe I was probably acting on a legal opinion at that time.

**26** Documents Nos. 1, 2 and 3 have been the subject of partial disclosure. Documents Nos. 1, 2, 3 and 4 are being asserted by one or more of the defendants as justifying their actions in respect of the position taken by the defendant Esquimalt before Mr. Justice Gow. I am of the view that the solicitor-client privilege has been waived in respect of Documents Nos. 1, 2, 3 and 4.

**27** I order production of Documents 1, 2, 3 and 4. The defendants must produce the enclosures appended to Documents 1, 2 and 3.

**28** A copy of Document No. 5 was delivered to a newspaper, the Esquimalt News, and was referred to in a news story published on June 28, 1989. The plaintiffs submit that the delivery of a copy of Document No. 5 to the Esquimalt News destroys the solicitor-client privilege formerly attaching to that document.

**29** The defendant W. Ronald Warder, as Mayor of the defendant Esquimalt, asked that an inquiry under s. 745.1 of the Municipal Act be conducted relating to the circumstances of the delivery of that document to the Esquimalt News. This request is contained in a document dated June 28, 1989, identified as defendants' Document No. 107. In that document Mr. Warder noted that the delivery of the document to the Esquimalt News appeared to him to constitute a breach of trust. Mr. Warder thought it might be a matter covered under s. 122 of the Criminal Code.

**30** On the examination for discovery of Mr. Sandy Gray, as Clerk/Administrator of the defendant Esquimalt, Mr. Gray testified that the editor of the Esquimalt News had told him that a member of Esquimalt's Council had given him a copy of Document No. 5. Mr. Gray testified that there was no disclosure made to him as to who that was.

**31** There is no other evidence before me as to who delivered Document No. 5 to the Esquimalt

News. There is no evidence that this was done by any of the defendants, even though all of the personal defendants were examined for discovery. There is no evidence that any of the defendants did anything to voluntarily waive solicitor-client privilege. It appears that even though Document No. 5 was delivered to the Esquimalt News, and even though it forms the basis for the news story published on June 28, 1989, the contents of it remain relatively confidential. The evidence before me is that it may be that the only unauthorized persons to have seen this document are employees of the Esquimalt News.

**32** The application before me is not one to require the Esquimalt News or its employees to produce Document No. 5, nor is it an application to restrain them from any further disclosure of its contents. It is that the defendants must produce Document No. 5 to the plaintiffs.

**33** If Document No. 5 was in fact disclosed to the editor of the Esquimalt News by a person entitled to waive the solicitor-client privilege attaching to it, there will have been a waiver of privilege by that voluntary disclosure. The only evidence before me that there was such a waiver is the hearsay evidence of Mr. Gray given on his examination for discovery.

**34** It is open to the plaintiffs to obtain direct evidence of waiver, if there was waiver, from the editor of the Esquimalt News. This can be done pursuant to a subpoena or under other of the Rules. The plaintiffs have thus far chosen not to do so but seek relief on Mr. Gray's hearsay evidence.

**35** Although this is an interlocutory application, an order for production of this document would be a final determination that the defendants are not entitled to maintain solicitor-client privilege in respect of it. The hearsay evidence relied upon by the plaintiffs is unsatisfactory. It is incomplete. There is no evidence as to the identity of the person who is said to have waived the defendants' right of privilege. The evidence is not reliable. There may be reasons other than truth why the editor of the newspaper involved might, in an unsworn aside, ascribe the source of his information to an unidentified member of Esquimalt's Council. He might not want to reveal that the document had been released by a person clearly not entitled to make the disclosure. Finally, it is not necessary to determine the matter on hearsay evidence. Direct evidence is available.

**36** There is no evidence the defendants have waived solicitor-client privilege in respect of Document No. 5. I decline to make a finding, on the evidence before me, that a person unknown has waived the defendants' privilege in respect of this document.

**37** It is open to the plaintiffs to obtain direct, sworn evidence as to the circumstances surrounding the disclosure of Document No. 5. The defendants can then renew their application, either before or at trial.

**38** It is submitted, alternatively, that even if the disclosure to the Esquimalt News emanated from some source other than a person entitled to maintain solicitor-client privilege in respect of it, that that disclosure has destroyed the solicitor-client privilege. In those circumstances, the loss of privilege would not rest on a waiver of privilege.

**39** There has, to date, been no such communication of the nature of Document No. 5 as would render the maintenance of solicitor-client privilege meaningless. Accordingly, it is not necessary for me to decide whether widespread publication, even if wrongful, destroys solicitor-client privilege. If this disclosure was a wrongful disclosure by an unauthorized party, I find that it did not destroy the privilege. See *Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd.* (1992), 10 C.P.C. (3d) 388 and *Royal Bank v. Lee* (1992), 9 C.P.C. (3d) 199.

**40** On the evidence before me, Document No. 5 remains the subject of solicitor-client privilege, notwithstanding the delivery of a copy of it by a person or persons unknown to the Esquimalt News.

**41** Finally, the plaintiffs submit that the privilege attaching to Documents Nos. 5, 6 and 7 ought to be waived in the public interest. The plaintiffs submit that authority for such a judicial waiver is found in *Carey v. The Queen in Right of Ontario et al.* (1986), 30 C.C.C. (3d) 498 at pp. 512-516. This is a decision of the Supreme Court of Canada, relating to the privilege accorded to Cabinet documents. The Court held that Cabinet documents must be disclosed unless disclosure interferes with the public interest. The Court held that the matter should be determined by the trial judge, following an inspection of the documents. The *Carey* case deals with the Crown privilege attaching to Cabinet documents.

**42** I decline to order production of Documents No. 5, 6 and 7. I make no determination as to whether it is open to the court to make an order that documents which are the subject of solicitor-client privilege must be disclosed because disclosure is in the public interest. That determination, and the decision as to whether production will be ordered if it is found that it is open to the court to order production, are matters for the trial judge.

**43** I direct that the copies of Documents Nos. 1 to 7 provided to the Court for inspection pursuant to Rule 26(12) be placed in a sealed envelope and held in the court file, and that the envelope not be opened without further order of the Court.

SHABBITS J.