

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LILLIAN CHOW

PLAINTIFF

AND:

MELVIN MADDESS, LYNN MCMASTER,
NICODEMO SANSALONE, ALVIN HUNNISETT,
VINCENT SCALERA, and BRITISH COLUMBIA TRANSIT

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COULTAS

Counsel for the Plaintiff:	Karen Jamieson
Counsel for the Defendant:	Timothy Delaney
Place and Date of Hearing:	Vancouver, B.C. October 1, 1999

[1] In the action the plaintiff seeks damages from the defendants for injuries suffered as a result of sexual misconduct by five BC Transit operators (Maddess, McMaster, Sansalone, Hunnisett, and Scalera). These Reasons address an Application by the defendant, BC Transit, under R. 26 of the *Rules of Court* for further production of documents which the plaintiff claims are privileged.

[2] On March 16, 1999 the plaintiff swore an affidavit in response to a Rule 18A Application. In the affidavit she deposed that throughout her childhood she spoke with other bus drivers, besides the personal defendants. One bus driver she spoke to often was Jerry Parminter, whom she later knew as a road supervisor for BC Transit. The plaintiff then related a conversation with Mr. Parminter which took place in November 1991. She concluded her affidavit:

My memory of the details of my conversation with Mr. Parminter was better in 1995 than it is today. In 1995 I wrote out a statement for my lawyer, Richard Begin, regarding that conversation. A copy of my statement is attached and marked Exhibit "D". I note that in the statement I wrote "mentioned Nick, Vince & Al - be careful" and I conclude from that notation that those were the names mentioned to me by Mr. Parminter. Although I do not presently recall the exact names he mentioned in the course of our conversation, I do recall that the names were those of some of the defendants. In addition, I know I was being truthful when I wrote

out the statement for Mr. Begin and I know that I had a clear recollection of the conversation with Mr. Parminter when I wrote the statement.

[3] There is no doubt that the attachment of the note is a waiver of privilege over this document and that is not disputed by plaintiff's counsel. BC Transit submits that the claim of privilege should be set aside for any other documents created in 1995 in the file of Mr. Begin, the plaintiff's former lawyer, or the file of Dickson Murray, the plaintiff's current lawyers, relating to what the plaintiff told her lawyers about this conversation between herself and Mr. Parminter.

[4] After hearing submissions on this Application I ordered plaintiff's counsel to determine if any such documents existed before I would proceed with my determination. By letter dated October 5, 1999 plaintiff's counsel advised:

1. Mr. Richard Begin, barrister and solicitor, has one page of his own notes of a conversation with Lillian Chow in which she discusses a conversation between herself and Jerry Parminter. The note is undated but Mr. Begin is certain his note was made in 1995.
2. Mr. Begin has no additional statements made by Ms. Chow regarding Jerry Parminter.
3. Dickson Murray has no notes dated in 1995 of conversations with Ms. Chow in which she discusses a conversation with Jerry Parminter.
4. Dickson Murray has no additional statements made by Ms. Chow regarding a conversation with Jerry Parminter.

Thus, the only document in question is the page of notes made by Mr. Begin.

[5] Counsel for BC Transit relies on *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 22 B.C.L.R. (2d) 74 (S.C.), a decision of Spencer J., in support of its application. Spencer J. at p. 76, said:

[Counsel for the defendant] drew my attention to a passage in Wigmore (McNaughton revision 1961) at s. 2327 dealing with waiver by implication. I quote:

There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.

There follows a list of criteria which will be applied in determining whether waiver of the privilege in part carries waiver of the whole privilege. In my opinion that does not apply in the case at bar. There is a clear dividing line between the documents which have been produced by the plaintiff which have to do with advice given by [the solicitor] in the course of negotiating and administering the contract here in question and communications which arose later, from November 1983 onwards, directed predominantly to the purpose of prosecuting or defending actual or anticipated litigation.

In the present case there is no such clear dividing line. Begin's note seems to have been made at or near the same time as the statement the plaintiff spoke of in her affidavit of March 16, 1999, it deals with the same subject matter, and it was created for the same purpose, anticipated litigation against the defendants.

[6] Further, one of Wigmore's criteria, referred to by Spencer J., is of particular relevance to this Application:

The client's offer of his own or the attorney's testimony as to a *part of any communication* to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of completeness...

[7] When the plaintiff waived privilege over her handwritten note by exhibiting it to her affidavit, she also waived privilege over the notes created by Mr. Begin with respect to what she told him about the conversation between herself and Mr. Parminter. The plaintiff cannot choose what will be produced and withhold the remainder - it would be unfair to allow this, as the plaintiff could choose the evidence most favourable to her and withhold the rest.

Order

[8] I order the production by the plaintiff of Mr. Begin's notes of the conversation with Lillian Chow in which she discussed a conversation between herself and Mr. Parminter.

