

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:
Counsel for the Defendant:
Place and Date of Hearing:

Karen Jamieson
Timothy Delaney
Vancouver, B.C.
September 23, 24, 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 plaintiff under Rule 26 of the *Rules of Court* for further production of documents by the defendant, BC Transit.

[2] In April 1995 the plaintiff, who was twenty at the time, reported to the RCMP that sexual misconduct had occurred on the part of the five personal defendants between 1988 and 1992. Upon being advised of the plaintiff's complaints, BC Transit commenced an internal investigation into the plaintiff's allegations, for they related to five of its employees and the incidents allegedly occurred while the employees were on duty. In late June 1995 counsel for BC Transit was informed by counsel for the plaintiff that an action was going to be brought against BC Transit in relation to these incidents. BC Transit's internal investigation continued through the period, April through September 1995. On September 13, 1995 three of the five personal defendants were terminated by BC Transit for their sexual misconduct with respect to the plaintiff and one of them resigned. In September or October 1995 BC Transit retained a private investigator to further investigate the allegations. No documents were created by the investigator until October 1995 at the earliest. The Writ of Summons and Statement of Claim in these proceedings were not filed until July 25, 1996.

[3] The documents sought relate to BC Transit's investigation of the alleged misconduct of the personal defendants. BC Transit's position is that the documents are privileged as they were created for the purpose of preparation for and conduct of litigation.

[4] In *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.) Wood J.A., delivering the judgment of the Court, said at pp. 260-261:

[T]he correct rule, as adopted in *Voth*, is that stated by Barwick C.J. of the Australian High Court in *Grant v. Downs* (1976), 135 C.L.R. 674 at 677:

Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

Any attempt to apply the rule when determining a claim of privilege with respect to a document necessarily requires that two factual determinations be made:

- (a) Was litigation in reasonable prospect at the time it was produced, and
- (b) If so, what was the dominant purpose for its production?

...

The onus is on the party claiming privilege to establish on a balance of probabilities that both tests are met in connection with each of the documents falling within the claim.

I. Litigation in Reasonable Prospect

[5] The Court in *Hamalainen* at p. 261 described this part of the test:

In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.

Counsel for the plaintiff conceded and I accept that litigation was a reasonable prospect by late June 1995 when the plaintiff's previous lawyer, Mr. Begin, informed counsel for BC Transit that it would be named as a defendant in an anticipated action.

II. Dominant Purpose for Production

[6] The primary issue to be determined in this Application is whether or not BC Transit has established on a balance of probabilities that the dominant purpose for the creation of the documents sought was preparation for litigation. I find this has not been established. I find the dominant purpose for the creation of documents before September 13, 1995 was an investigation of employee misconduct. Support for this can be found in the following evidence:

[1] BC Transit's Operator's Manual states that:

There are of necessity certain rules which if contravened, may endanger the welfare and safety of yourselves, your fellow employees or the public. The Company takes a most serious view of offences such as the following which will result in discipline up to and including discharge:

...

[1] discourtesy to passengers

...

An operator found to be discourteous, abusive or rude to a passenger will be subject to discipline up to and including discharge.

For BC Transit to determine if any disciplinary action should be taken, an investigation was necessary. Considering the seriousness of these allegations and the number of people involved it is not surprising that the investigation took a significant period of time.

(2) Correspondence between Mr. Gatley, BC Transit's Senior Labour Relations Advisor, and Mr. Scott, President of the operators' union, dated June 21, 1995 and July 4, 1995 shows that the employment investigation was still ongoing.

(3) In a letter dated September 5, 1995 from Mr. Greyell, the solicitor for BC Transit at the time, to the RCMP requesting information, he said:

BC Transit must investigate the allegations made against their drivers to determine whether they have committed any employment offences. As you will undoubtedly appreciate, our client is charged with a high degree of responsibility for ensuring safety in the transport of the public. In addition, a large portion of transit users are children; BC Transit is accountable and responsible for their safety and protection as well.

[10] BC Transit submits that the dominant purpose for creating the documents sought was the prospect of litigation. I find that the dominant purpose before the employees were terminated, was an employment investigation. The letter from Mr. Greyell to the RCMP referred to indicates that BC Transit had still not determined whether employment offences had been committed.

[11] After disciplinary action was taken against the employees it can be inferred that the dominant purpose changed - to preparation for litigation. Any documents created after employee terminations, including those created by the investigator, are privileged, for the dominant purpose for their creation was the prospect of litigation.

Order

[12] I order the production by BC Transit of any documents created before September 13, 1995 by BC Transit or third parties, except:

- (a) documents in the Greyell McPhail solicitor's brief; and
- (b) documents of communication between Greyell McPhail and BC Transit.

"Coultras, J."