CV 04897

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TRACY BUTTERFIELD, CHRISTINA BUTTERFIELD, an infant, by her next friend, TRACY BUTTERFIELD, THE ESTATE OF GREGORY BUTTERFIELD, DECEASED BY ITS EXECUTRIX, TRACY BUTTERFIELD

Plaintiffs

- and -

RONALD DICKSON; LAURIE STEWART; THE GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the Minister of Economic Development and Tourism; EUGENE WASSERMAN; EUGENE WASSERMAN carrying on business as ROYAL CATERING; THE SUPERINTENDENT OF PARKS appointed under Section 7 of the Territorial Parks Act; MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION and JOHN CORMACK

Defendants

- and -

EUGENE WASSERMAN and EUGENE WASSERMAN carrying on business under the trade name and style of ROYAL CATERING; RONALD DICKSON and LAURIE STEWART, MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION; JOHN CORMACK

Third Parties

Application for ruling on a claim of privilege over the production of insurance adjusters' reports.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, N.W.T.
June 14, 1994

Judgment filed: June 16, 1994

Counsel for the Defendant,
Bayliner Marine Corporation
(the "applicant"): V.A. Schuler, Q.C.

Counsel for the Defendants,
Dickson and Stewart
(the "respondents"): E. Keenan-Bengts

Counsel for the Plaintiffs: G.K. Phillips

Counsel for the Defendant,
Mister B's Power Products
Ltd.: E.D. Johnson, Q.C.

CV 04897

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TRACY BUTTERFIELD, CHRISTINA BUTTERFIELD, an infant, by her next friend, TRACY BUTTERFIELD, THE ESTATE OF GREGORY BUTTERFIELD, DECEASED BY ITS EXECUTRIX, TRACY BUTTERFIELD

Plaintiffs

- and -

RONALD DICKSON; LAURIE STEWART; THE GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the Minister of Economic Development and Tourism; EUGENE WASSERMAN; EUGENE WASSERMAN carrying on business as ROYAL CATERING; THE SUPERINTENDENT OF PARKS appointed under Section 7 of the Territorial Parks Act; MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION and JOHN CORMACK

Defendants

- and -

EUGENE WASSERMAN and EUGENE WASSERMAN carrying on business under the trade name and style of ROYAL CATERING; RONALD DICKSON and LAURIE STEWART, MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION; JOHN CORMACK

Third Parties

REASONS FOR JUDGMENT

1 The defendant, Bayliner Marine Corporation (the "applicant"), seeks an order, pursuant to Rule 196 of the Supreme Court Rules, compelling the co-defendants, Ronald

Dickson and Laurie Stewart (the "respondents"), to file a Statement as to Documents and to produce for discovery certain reports prepared by adjusters retained by the respondents' liability insurers. The respondents resist production of these reports on the ground that they are subject to a "legal professional privilege", or "litigation privilege", having been prepared with the dominant purpose of submitting them to legal counsel for use in litigation.

2 The plaintiffs and the co-defendant, Mr. B's Power Products Ltd., support the application. The other parties did not participate and took no position on this matter.

3 This action arises from a boating incident in which the late Gregory Butterfield was killed. The boat in question was owned and operated by the defendant Dickson. The date of death was May 26, 1993. A Statement of Claim was filed on October 27, 1993. This was amended on January 18, 1994, adding the applicant, and others, as party defendants. There are also cross-claims among the defendants.

4 The respondents' insurers were informed of the fatality on May 28, 1993. On that date they retained the services of Cottrell & Associates (N.W.T.) Ltd., a firm of insurance adjusters, to carry out an investigation of the circumstances of the fatality. The insurance company's representative, Glen MacRae, has stated in an affidavit filed on this motion:

> " ... My immediate expectation was that there would be litigation as a result of the fatality and it would be necessary to obtain information as soon as possible on the circumstances of the accident to put before legal counsel for the defence of that expected litigation."
>
> - and -
>
> "It was my intention that all reports of Mr. Cottrell would be turned over to legal counsel to prepare a defence for the expected claim ..."

5 The subject-matter of this application are three of the adjusters' reports, dated May 30, June 3, and July 27, 1993, respectively. The first two were forwarded to the insurers. The third was forwarded to the firm of solicitors (located in Vancouver) retained by the insurers.

6 Mr. MacRae deposes that he informed the adjusters on June 9, 1993, of the retention of legal counsel and that further reports were to be directed to counsel. The respondents' counsel in Vancouver, Richard Twining, deposes that his file was opened in early August of 1993 but he had been advised by Mr. MacRae, on an earlier date, about the fatality. Mr. MacRae also deposes that he wanted to see the initial report on the circumstances of the fatality before deciding which law firm to retain for the defence of the insureds.

7 Contrary to the requirement of Rule 193, the respondents have not yet filed a Statement as to Documents. Their Vancouver counsel, Mr. Twining, apparently in January, 1994, prepared a document titled "List of Documents" which is the form used in British Columbia. This document is unacceptable under our rules of procedure. No

reasonable explanation has been given as to why the clear requirements of our rules were not followed.

8 The "List of Documents" contains the following entry:

> PART III: Documents for which privilege from production is claimed:
>
> 1. Various adjusters' reports, memoranda, notes and correspondence to counsel.
>
> 2. The original or copies of documents which are privileged as they are documents which were produced or brought into existence either with a dominant purpose of its author, or the person under whose direction it was produced or brought into existence, or using it or its contents in order to seek, formulate or give legal advice or legal assistance, or to conduct or aid int he conduct of litigation or to provide information to the solicitors for the Defendants Ronald Dickson and Lauris Stewart, after this litigation commenced or at a time when there was a reasonable prospect of litigation.

9 It is unclear from the formulaic expression used whether the assertion in paragraph 2 (reproduced above) is meant to relate to the items in paragraph 1. I am told that it does. In addition, both Mr. Twining and Mr. MacRae assert in their affidavits that the reports are privileged as having been prepared for the dominant purpose of being put before legal counsel in anticipation of litigation. The opinions of Mr. Twining and Mr. MacRae are merely that, opinions, and as such are not conclusive of the issue. Whether or not litigation was the dominant purpose is for me to decide on the basis of the evidence before me.

10 As part of the evidence, all counsel agreed that I should review the reports in question, in private, as contemplated by Rule 196(2). The dominant purpose can be discerned from the reports as well as from the evidence submitted.

11 But there is still a fundamental problem with the approach taken by respondents' counsel. This problem was identified by Esson J.A. in Shaughnessy Golf & Country Club v. Uniguard Services Ltd. et al (1986), 1 B.C.L.R. (2d) 309 (C.A.), at page 319:

> The plaintiff has not established that the reports all owe their genesis to the dominant purpose of being used for the purpose of obtaining legal advice or to conduct or aid in the conduct of litigation which, at the time of its production, was in reasonable prospect. What it did prove is that, if the reports are taken as a whole and treated as one document, the dominant purpose of the whole as to aid in the conduct of litigation. But that is not the proper way for the matter to be approached. Privilege was claimed for a large number of documents. The grounds for it had to be established in respect of each one. By trying to extend to the whole list the considerations which confer privilege on most of the documents, the plaintiff has confused the issue and created the risk that, because it did not make in its evidence the distinctions that could have been made, it must be held not to have established privilege for any.

12 In this case, the respondents have done exactly what is cautioned above. They have attempted to extend a blanket privilege over all reports without attempting to distinguish between any individual reports. There is certainly a distinction, one that was made by respondents' counsel at the hearing, between the third report (addressed to the solicitors) and the first two reports (sent to the insurers). The respondents failed to address each specific claim for privilege, a failure which may stem from the fairly informal

practice of simply preparing a "List of Documents" instead of conforming to the procedures of this court.

13 All counsel agree that the "dominant purpose" test is the guiding one to determine the claim for privilege. All counsel also agree that the respondents, as the ones asserting the privilege, bear the onus of establishing that the dominant purpose of the preparation and delivery of the reports in question was for the use by counsel in litigation contemplated or in existence.

14 The "dominant purpose" test was elucidated by the House of Lords in Waugh v. British Railways Board, [1979] 2 All E.R. 1169. The question in that case was whether a report, prepared after a fatality in a train accident, was privileged. The report was prepared for a dual purpose by officers of the railway board pursuant to internal policies: (1) to assist in establishing the cause of the accident; and (2) for submission to solicitors for the purpose of advising the board upon its legal liability and to conduct any proceedings arising from the accident. In ordering disclosure of the report, the House of Lords overruled previous English decisions which had been followed by Canadian courts. The decision is accurately summarized in the headnote of the case:

> The court was faced with two competing principles, namely that all relevant evidence should be made available for the court and that communications between lawyer and client should be allowed to remain confidential and privileged. In reconciling those two principles the public interest was, on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document was only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal advisor for advice and use in litigation. Since the purpose of preparing the internal enquiry report for advice and use in anticipated litigation was merely one of the purposes and not the dominant purpose for which it was prepared, the board's claim of privilege failed and the report would have to be disclosed.

15 The Waugh decision is framed in the context of "communications between lawyer and client" but it is not, strictly speaking, concerned with the traditional concept of solicitor-client communications. Solicitor-client privilege is, generally speaking, absolute and extends beyond the litigation context to protect any communication made to a lawyer by his or her client in a bona fide effort to obtain legal advice. The concept of a "legal professional privilege" (as the House of Lords termed it) or a "litigation privilege" (as others have called it) is relative and qualified. It arises from the need to balance the competing interests of achieving justice by liberal disclosure of relevant information and the self-interest in non-disclosure inherent in our adversarial mode of trial. For a discussion of this distinction, see R.J. Sharpe, "Discovery --- Privilege and Preliminary Investigative Reports" (1981), 59 Canadian Bar Review 830.

16 The "dominant purpose" test has been adopted in Canada by numerous appellate courts: Davies v. Harrington (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); Voth Bros. Construction (1974) Ltd. v. Board of School Trustees et al, [1981] 5 W.W.R. 91 (B.C.C.A.); McCaig v. Trentowsky (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); and, Nova, An Alberta Corporation v. Guelph Engineering Co. et al, [1984] 3 W.W.R. 314 (Alta.C.A.).

It has also been applied in this jurisdiction: Arctic Star Lodge (N.W.T.) Ltd. v. New Hampshire Insurance Co., [1989] N.W.T.R. 188 (S.C.).

17 The respondents say that, having regard to the nature of the claim, the focus of the investigation from the start was to gather information so as to defend a claim. This position follows those cases that seem to assume that when a major calamity, such as a death or large property loss, occurs, and insurance is available, the anticipation of litigation immediately arises and therefore the dominant purpose, if not the only purpose, in conducting an investigation is for the advice of counsel: Anger v. Dykstra (1984), 45 O.R. (2d) 701 (H.C.J.); Krusel v. Firth, [1992] B.C.J. No. 2443 (S.C. Master).

18 In considering the case before me, I am influenced to a great extent by the judgment of Wood J.A. in Hamalainen v. Sippola (1991), 62 B.C.L.R. (2d) 254 (C.A.). In that case, a serious personal injury claim arising from a motor vehicle accident, the defendant's liability insurers instructed adjusters to investigate immediately after the accident. The adjusters prepared ten reports before notifying the plaintiff that the defendant was denying liability. On an application by the plaintiff, the defendant was ordered to produce the ten reports. In upholding this decision, Wood J.A. set out the two factual determinations that must be made in determining whether to uphold a claim of privilege:

(1) Was litigation in reasonable prospect at the time the report in question was produced?

(2) If so, what was the dominant purpose for its production?

19 On the question of the reasonable prospect of litigation, there must be more than the mere possibility of litigation. On the other hand, as Wood J.A. says, it does not mean a certainty. He goes on to say (at page 261): "In my view, litigation can be properly 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." I agree.

In this case, the nature of the claim, involving as it does a fatality, and the mysterious nature of the cause of the incident, satisfy me that there was a reasonable prospect of litigation from the time the adjusters were appointed to investigate.

21 The second, and more difficult issue, is whether the dominant purpose for the preparation of the reports was to obtain legal advice or aid in the conduct of the litigation.

22 In the Waugh decision, dealing as it did with a report that admittedly had a dual purpose, Lord Wilberforce laid down the policy consideration behind the test (at page 1173):

> It is clear that the due administration of justice strongly requires disclosure and production of this report; it was contemporary; it

> contained statements by witnesses on the spot; it would be not merely relevant evidence but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it; to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available.

23 In Hamalainen, Wood J.A. applied this reasoning to the practical circumstances of a claim such as the one advanced in the case before me. He drew a distinction between an "investigative" phase --- where the dominant purpose is gathering information --- and the "litigation" phase --- where the dominant purpose is preparing for the anticipated litigation. I quote again from the judgment of Wood J.A. (at page 262):

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it was based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

24 In the case before me, all three of the sought-after reports were prepared before

the commencement of the litigation. The first two were prepared prior to the formal retention of legal counsel. The adjusters were initially instructed to conduct a comprehensive investigation into the circumstances of the fatality. I am satisfied that these two reports are subject to production since their primary aim, or at least an aim co-extensive with concerns over anticipated litigation, was to obtain information so that the insurers can assess their position.

25 Mr. Twining could not give the date when he was first contacted by the insurers. The best evidence is from Mr. MacRae who says he "would have" contacted Mr. Twining's firm at the same time he instructed the adjusters on June 9, 1993, to direct reports to that firm. But it is obvious that nothing was done by counsel, even though the third report was forwarded directly to counsel, until sometime in August because Mr. Twining says he did not open a file until early August.

26 Even if there had been contact between Mr. MacRae and Mr. Twining prior to July 27, 1993, there is no evidence that legal counsel had any involvement in or gave direction to the adjusters in their investigations. Furthermore, I do not believe that cursory verbal communications, regarding a possible claim, between the insurers and counsel could or should thwart the requirement of disclosure. Just because counsel is contacted does not mean that all future activity is done with litigation as its dominant purpose. A report cannot be shrouded in a veil of privilege merely because counsel has been put on notice or that the report is addressed to counsel and labelled (by the maker of the report) as

being "privileged".

27 I am satisfied that the third report as well had, at least as a co-extensive purpose, the gathering of information. Advice to counsel was not the dominant purpose.

28 These reports also fulfilled other purposes, primarily administrative ones between the insurance company and its insured. There was the settlement of a property damage claim by the insured. There was also a review of potential coverage issues between the insurer and the insured. They do contain witness statements and opinions but I find that the focus of these reports, up to and including the third one, is as much on investigation as it is on litigation. Furthermore, while there is in the third report an indication that a claim will be advanced on behalf of the plaintiffs, that indication comes personally from the widow, not from a lawyer, in a context more of seeking advice from the adjuster than any formal notification of suit.

29 Finally, there is a further basis for ordering disclosure of these reports.

30 There is evidence that certain tests and adjustments were made to the boat by the respondents after the fatality. The applicant therefore will not be able to inspect the boat in exactly the same condition it was in at the time of the fatality. In the interests of justice the applicant should have access to these reports so as to assess the affect of any adjustments made to the boat since then.

The application is therefore granted and I order as follows:

(1) The adjusters' reports dated May 30, June 3 and July 27, 1993, shall be produced, on or before the 24th day of June, 1994, for inspection together with all attachments and schedules referred to therein.

(2) The respondents shall file and serve a Statement as to Documents on or before the 30th day of June, 1994.

32 The respondents shall pay to the applicant its costs of this application in any event of the cause. Since the other parties took only a peripheral role in this matter, they shall neither pay nor receive costs for this application.

33 The clerk is hereby directed to return the reports, left with me for review and sealed by me, to counsel for the respondents.

John Z. Vertes
J.S.C.

Counsel for the Defendant, Bayliner Marine Corporation (the "applicant"):	V.A. Schuler, Q.C.
Counsel for the Defendants, Dickson and Stewart (the "respondents"):	E. Keenan-Bengts
Counsel for the Plaintiffs:	G.K. Phillips
Counsel for the Defendant, Mister B's Power Products Ltd.:	E.D. Johnson, Q.C.

CV 04897

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TRACY BUTTERFIELD, CHRISTINA BUTTERFIELD, an infant, by her next friend, TRACY BUTTERFIELD, THE ESTATE OF GREGORY BUTTERFIELD, DECEASED BY ITS EXECUTRIX, TRACY BUTTERFIELD

Plaintiffs

- and -

RONALD DICKSON; LAURIE STEWART; THE GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the Minister of Economic Development and Tourism; EUGENE WASSERMAN; EUGENE WASSERMAN carrying on business as ROYAL CATERING; THE SUPERINTENDENT OF PARKS appointed under Section 7 of the Territorial Parks Act; MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION and JOHN CORMACK

Defendants

- and -

EUGENE WASSERMAN and EUGENE WASSERMAN carrying on business under the trade name and style of ROYAL CATERING; RONALD DICKSON and LAURIE STEWART, MISTER B'S POWER PRODUCTS LTD. carrying on business as MISTER "B" MARINELAND; BRUNSWICK CORPORATION; BAYLINER MARINE CORPORATION; JOHN CORMACK

Third Parties

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES