MacMILLAN BLOEDEL LIMITED

v.

ASSESSORS FOR VICTORIA (CAPITAL), WILLIAMS LAKE (CARIBOO), CHILLIWACK, COURTENAY, COWICHAN VALLEY, NANAIMO, WEST VANCOUVER, NORTH VANCOUVER (NORTH SHORE-SQUAMISH VALLEY), TERRACE (NORTHWEST), PORT ALBERNI, AND SECHELT (SUNSHINE COAST) ASSESSMENT AREAS

Supreme Court of British Columbia (2081/81) Victoria Registry

Before: CHIEF JUSTICE ALLAN McEACHERN (In Chambers)

Victoria, November 23, 24, 1981

P. Klassen for the Assessors
H.L. Henderson for the Appellant
Douglas Gray for Robert M. Malcolm
A.K. MacKinnon for the Association of B.C. Professional Foresters
Brian Wallace for a client of Robert M. Malcolm

Reasons for Judgment December 2, 1981

In the course of an appeal by MacMillan Bloedel Limited (the appellant) to the Assessment Appeal Board, a question arose regarding the permissible scope of cross-examination of Robert M. MaIcolm. an expert witness called on behalf of the appellant. The Board made a ruling which I shall mention in a moment, and, at the request of the Assessors, the Board stated a question for the opinion of the Court pursuant to section 74 (1) of the: *Assessment Act*, R.S.B.C. 1979, chapter 21.

The background facts, briefly, are as follows.
Various assessors determined the actual value of the appellant's merchantable timber in the conventional manner described in the Stated Case. The appellant challenges these assessments on the basis that, on larger parcels of land, the owner cannot harvest all the timber in one year, and accordingly seeks a discount to represent the value of timber harvested over a projected harvest period.

Paragraphs 6 to 12 inclusive of the Stated Case are as follows:

> "6. The question raised by the appellant concerns the determination which must be made by the Board as to whether the respondent Assessors have correctly determined the actual value of lands under appeal as required under the *Assessment Act*.
>
> 7. Robert MaIcolm, President of Robert M. MaIcolm Ltd., is a Registered Professional Forester and was qualified by the taxpayer's counsel as an expert witness to give

evidence on forestry matters and also on the valuation of timberlands. During the course of such qualification the witness testified that he had conducted:

(a) at least six Valuation Day appraisals of large tracts of timberland;

(b) a number of appraisals for the purpose of advising clients on the sale of timberland;

(c) a number of appraisals for the purpose of advising clients on the acquisition of timberlands.

8. Robert MaIcolm has submitted a brief to the Board containing the recommendation that the proper method by which actual value is to be reached is by revising the respondent's stumpage rates to a present value based on an objective term for harvesting each particular parcel of timberland. Annexure "A" is a copy of the brief of Mr. Malcolm.

9. During the course of his evidence in chief, the witness MaIcolm testified that the proper method of determining actual value was the method he proposed in the brief marked Annexure "A" and that other methods, such as the comparable sales approach, were not available to the Assessor due to the almost complete paucity of comparable timberland sales.

10. In cross-examination, Robert MaIcolm testified in doing Valuation Day appraisals, he may have used three approaches:

(a) the comparable sales approach;

(b) the income approach by:

(i) using adjusted Crown stumpage;

(ii) by determining an independent stumpage calculated from the log selling price.

11. The respondent now seeks to cross-examine Mr. MaIcolm on the validity of his method by demanding specific details of other opinions and valuations made by him for clients who are not parties to this cause and relating to lands which are not the subject of this appeal.

12. After argument the Board found cross-examination of the witness MaIcolm by the respondents' counsel as to general methodology used by Mr. MaIcolm in appraisals of timberlands for other purposes was relevant and further ruled that the respondent could cross-examine Mr. MaIcolm as to his methodology in general terms only, as to ask specific questions could damage the confidence between Mr. MaIcolm and clients who are not parties to this cause and whose lands are not the subject of this appeal."

Attached to the Stated Case is Mr. Malcolm's valuation. It shows substantial reductions in values between the two methods. For example, using a 14-year harvest period for just one parcel (Block 1339), Mr. Malcolm's valuation is $19,415,116, whereas the assessor's value is $38,314.890. This illustrates the importance to the assessor of the cross-examination of Mr. Malcolm.

The question stated for the opinion of the Court is

"Did the Assessment Appeal Board err in law in limiting the cross-examination of the expert witness Mr. Robert MaIcolm to exclude evidence as to specific details of appraisals conducted by Mr. Malcolm for other clients in relation to property other than

> those under appeal on the basis that such information is confidential between Mr. Malcolm and his other such clients."

I understand from this question that the Board is asking whether confidentiality is a valid basis for protecting Mr. Malcolm's other valuations.

As mentioned, counsel for the assessors was seeking to cross-examine Mr. Malcolm, on the validity of his valuation method by demanding specific details of other opinions and valuations made by the witness for clients who are not parties to this cause relating to lands which are not the subject of the appeal and none of these other valuations were for assessment purposes. Counsel was frank to state that he would probably also ask for production of the other valuations.

Mr. Klassen, counsel for the Assessors, says the Board erred in restricting his cross-examination on the ground of confidentiality. He says that he is entitled to test Mr. Malcolm's opinion, particularly his methods, by adducing evidence about Mr. Malcolm's previous work for other clients. He relies upon the principle mentioned in r*e Regina* v. *Snider* [1954] S.C.R. 479 at 482 where Rand, J., quoted Lord Chancellor Hardwicke:

> "It has, my lords, I own, been asserted by the noble duke that the public has a right to every man's evidence-a maxim which in its proper sense cannot be denied. For it is undoubtedly true that the public has a right to all the assistance of every individual."

Mr. Klassen argues that numerous authorities have held that the private work of any man, even a professional man, is not privileged or immune from production except in certain well recognized cases such as confidential communication between lawyers and their clients, husbands and wives, informers and police officers, etc. He . relies upon *re Regina* v. *Snider*, supra; *D* v. *National Society for the Prevention of Cruelty to Children* [1977] 1 All E.R. 589 (H of L): *Bergwitz* v. *Fast* (1980) 18 B.C.L.R. 368(B.C.C.A.).

The appellant and counsel for other interested parties (whose status was not challenged) argue that Mr. Malcolm's work for others is privileged, or immune from production on grounds of confidentiality, or alternatively that the Board has properly exercised a discretion to exclude this evidence. They rely, inter alia, upon the *Foresters Act*, R.S.B.C. 1979, chapter 141 and the regulations thereto, including the Foresters' Code of Ethics, and upon *Slavutych* v. *Baker et al* [1976] 1 S.C.R. 254 (S.C.C.); *Science Research Council* v. *Nasse et al* [1979] 3 W.L.R. 762 (H of L); *Brownell* v. *Brownell* (1909)42 S.C.R. 368 (S.C.C.); and *City of St. John* v. *Irving Oil Co.* [1966] S.C.R. 581 (S.C.C.).

In my opinion the Board erred in deciding this question on the basis of confidentiality, *Slavutych* v. *Baker,* supra, suggests that new categories of privilege based upon confidentiality arise whenever Professor Wigmore's four conditions of confidence are met. From this it was argued by the appellant and its supporters that Mr. Malcolm's work is privileged because the four tests of confidence are met.

These four tests appear in the Third Edition of Wigmore (McNaughton Revision, 1961) para. 2285. They are

> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

In the balance of paragraph 2285 the learned editors of Wigmore go on to point out how the four conditions are only met in certain well recognized relationships such as solicitor and client, and husband and wife. The four tests are not met in the other relationships mentioned, (physician and patient, priest and penitent). It is concluded in paragraph 2286:

> "In general then, the mere fact the communication was made in express confidence, or on the implied confidence of a confidential relation, does not create a privilege."

I believe Wigmore has developed these four tests for the purpose of explaining the requirements of existing privileged relationships. They do not set up any new umbrella of privilege under which a forester can obtain shelter, unless, of course, the conditions are met, keeping in mind that well recognized functions such as physician and priest do not qualify. The reason these other relationships do not qualify is, usually, because the public interest is against such a privilege. I think the public interest is against such a privilege for foresters in the same way that our Court of Appeal has suggested it is against dentists in *Bergwitz* v. *Fast*, supra.

It is true that the *Foresters' Act* clearly imposes an obligation of confidentiality upon foresters. But that only prohibits the voluntary disclosure of a client's affairs by a forester. It does not create a privilege which will override the public interest in the proper disposition of litigation between other parties.

With that in mind I wish to turn to *Slavutych* v. *Baker*, supra. That was a case where the University of Alberta asked a professor for his confidential opinion upon a colleague who had applied for tenure. Mr. Slavutych was told his opinion would be kept strictly confidential. He furnished his opinion on that basis, but he was disciplined (discharged) for an intemperate reply. The Supreme Court of Canada held the document ought not to have been employed as a basis for a disciplinary charge or introduced as evidence in the arbitration board's dismissal proceedings. I respectfully regard the case as one based upon its particular facts. The university, which promised confidentiality, was not allowed to renege on that promise. Spence, J., speaking for the Court, found that Wigmore's four tests were satisfied, but on the fourth test I think he relied upon the authorities quoted at page 262:

> ".. . Lord Denning. M.R. in *Seager* v. *Copydex, Ltd.*, at p. 417, [1967] 2 All E.R.415 . . . adopted the statement of Roxburgh J. in *Terrapin Ltd.* v. *Builders' Supply Co. (Hayes) Ltd. et al* [1960] RPC 128 as follows:
>
> 'As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public'."

Spence, J., followed this by saying:

> "I am of the opinion that that is a sound statement of the doctrine as to revelation of confidential communications *when it deals with the actions of those who are parties to the confidence* . . :" (My italics).

Later in the same passage Spence, J., said

> ". . . Here, it is the very party who instigated the communication in confidence and stressed its confidentiality who desires to not produce it but to use [it] as a basis for a

> charge of misconduct justifying dismissal. I quote from the judgment of Turner J., at p. 1036. [In *Bell* v. *University of Auckland* [1969] NZLR 1029].

'Here the parties to the present action have solemnly agreed before the action that the documents which are now in question should be brought into existence upon the solemn undertaking of both of them that the plaintiff will not be entitled to see the documents.'

One of those two parties was the plaintiff, and it was the plaintiff who sought the right to see the documents. In the present case, the solemn undertaking was made between the university, acting through the head of the department, and the appellant, and it is the university which seeks to use the document.

After his reference to *Argyll* v. *Argyll,* supra, Sinclair J.A. continued:

> 'I believe the equitable principle of breach of confidence has a role to play in the present appeal. It seems to me that when tenure procedure with respect to a candidate is initiated there comes into existence, within the University of Alberta, something which I will call, for want of a better term, an umbrella of confidence. The protection afforded by this umbrella extends to all within the institution who have a legitimate interest in the tenure proceedings. The nature of that shelter is such that confidential communications, made in good faith, ought not to be used to the prejudice of their maker as a member of the university community. That being so, had the tenure form sheet been submitted by the appellant in good faith, it should not have been used as part of his dismissal proceedings.'"

In my view Spence, J., relied upon the particular relationship of the parties to found immunity for the impugned document. I question whether the confidentiality relied upon by Spence, J., would have been given the same effect if the person seeking production of the document had been a stranger to the institutional arrangement under which the document was conceived.

Returning to this case, it is my view that there is no privilege attaching to Mr. Malcolm's previous work. Professor Wigmore's four tests are not met because, in a proper cause, the injury that would enure to the relation between Mr. Malcolm and his other client by disclosure of the communication would not be greater than the benefit thereby gained for the correct disposal of litigation. If it were otherwise then it could hardly be contended that physician and patient, and priest and penitent communications were not also privileged. In this connection, see also the comments of Taggart, J.A., in *Bergwitz* v. *Fast,* supra, at p. 369. Taggart, J.A, quoted Thurlow, J., in *re Blais and Andras* [1972] F.C. 958, 30 D.L.R. (3d) 287 at 292 (C.A.) as follows:

> ". . . the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege. . ."

Apart from privilege, it is clear that confidentiality alone does not create privilege or immunity.

But that does not dispose of this matter because, although the Board erred in limiting cross-examination on the ground of confidentiality, I respectfully agree with the submissions of counsel in this case that I should not interfere with the conclusion reached by the Board. I base my decision not on the grounds of privilege or confidentiality, but rather on the undoubted right of a tribunal properly to control the scope of cross-examination. In the discharge of this responsibility the Board has a discretion, within proper bounds, to determine how far afield cross-examining counsel may go in testing the evidence of a witness. There must always be reasonable restraints upon the scope of cross-examination.

The enquiry before the Board related to the value of the appellant's timberlands. Mr. Malcolm expressed an opinion on that question in his evidence in chief and he explained his method of valuation. He had to subject himself to cross-examination, and the Board did not stop counsel

from asking him about the methods he employed in valuing these and other properties. Whether it is necessary to go into the specific details of these other valuations or to produce his reports is a matter for the discretion of the Board. The collateral evidence rule and the good sense of the Board must work together to keep the enquiry within reasonable bounds. In exercising its discretion the Board is entitled to consider all relevant circumstances including, possibly, comparisons between the properties in question and the other properties valued by the witness. The fact that the production of Mr. MaIcolm's other reports may involve the disclosure of confidential communications is also a factor the board may take into account in deciding where to draw the line.

I cannot say that the Board erred in the result of its disposition of this evidentiary question. In this context the *Brownell* and *City of St. John* cases, supra, are relevant.

I would therefore answer the specific question stated for the opinion of the Court in the affirmative because the question, as I understand it, requires an answer regarding the correctness of the grounds upon which the evidence was excluded. In that respect the Board erred. I have already said, however, that the evidence may be excluded on other grounds. The entire matter is therefore remitted to the Board for its determination of the question of whether Mr. MaIcolm should or should not be required to produce the impugned evidence apart from the simple question of confidentiality.

In the circumstances, I do not think there should be any order for costs.