

No breach of confidence for director to disclose corporation's confidential information to personal lawyer (Anderson v. Strathcona (Regional District))

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A decision of the Court of Appeal for British Columbia has affirmed that it is not a breach of confidence for a director of a municipality to disclose confidential information to their own lawyer to obtain personal legal advice: *Anderson v. Strathcona (Regional District)*, 2024 BCCA 23 (CanLII).

The director was an elected member of the board of the respondent regional district. In 2018, her father's cabin on Cortes Island, British Columbia, burned down. Some of the director's friends organized a "Go Fund Me" campaign which raised approximately \$3,700 to rebuild the cabin.

The district received complaints alleging that the director had received gifts in her capacity as a board member and that there was a potential conflict of interest in connection with the Go Fund Me campaign.

Several residents of Cortes Island also filed a petition in the Supreme Court of British Columbia seeking to disqualify the director from holding office until the next election due to the alleged conflict of interest in connection with the Go Fund Me campaign.

The district's board considered the complaints and the Go Fund Me campaign in "closed" reports that were intended only for its own use. Further, the board retained an outside investigator to look into the allegations and the district's lawyer prepared legal opinions on the director's actions, which were provided to all board members, including the director.

The director sought legal advice from her own lawyer in response to the conflict of interest allegations and the matters addressed in the board's closed reports. She provided her lawyer with copies of the board's closed reports and the opinions received from the district's lawyer. Her lawyer corresponded with the district's lawyer about the allegations, the closed reports, and the district lawyer's legal opinions.

The investigation report obtained by the board ultimately absolved the director of any wrongdoing. Further, the British Columbia Supreme Court dismissed the disqualification petition, concluding that there was no basis for the declarations sought by the petitioners and that the director did not accept a gift as alleged.

The board then took steps to censure the director for disclosing confidential information to her lawyer in contravention of section 117 of the *Community Charter*, which states in part that a council member must, unless authorized otherwise by council, keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required.

The board's position was that the district had not waived solicitor-client privilege and the director needed the board's permission to disclose the district's confidential information to her lawyer. The board passed a resolution which expressed disapproval of the director's disclosure of the opinions, directed that she

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comply with the *Community Charter* and the related *Code of Conduct*, imposed sanctions, and outlined future measures to be taken concerning her impugned conduct.

The director sought an order from the British Columbia Supreme Court quashing the board's censure decision. However, after a three-day hearing, the chambers judge found that the board's decision was not unfair or unreasonable based on principles of administrative law and that the board was justified in censuring the director's disclosure of confidential information to her lawyer without seeking permission from the board: *Anderson v. Strathcona Regional District*, 2021 BCSC 1800 (CanLII).

The director then appealed to the Court of Appeal for British Columbia.

In its decision, the appellate court noted that solicitor-client privilege and confidentiality are related, but distinct, concepts. Solicitor-client privilege has acquired "constitutional dimensions" as a principle of fundamental justice and part of a client's fundamental right to privacy: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paragraph 20.

Further, the Supreme Court of Canada has repeatedly held that solicitor-client privilege is essential to the proper functioning of our legal system as "the justice system depends for its vitality on the full, free and frank communication between those who need legal advice and those who are best able to provide it": *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paragraph 26. The law protects privilege most zealously and is most reluctant to water down by exceptions: *University of Calgary* at para. 20; *Smith v. Jones*, 1999 CanLII 674 (SCC), at paragraphs 45–50.

Whether confidential information is protected by privilege or not, it may be subject to a duty of confidentiality. All privileged communications between a lawyer and their client must be kept confidential by the lawyer. Clients seeking advice must be able to "speak freely" to their lawyers secure in the knowledge that what they say will not be divulged without their consent. Speaking freely cannot be limited by requiring prior authorization.

Further, an actionable breach of confidence may arise where a defendant misuses confidential information to the detriment of the conveying party. As noted by the Court of Appeal, merely confiding information to a lawyer to obtain related legal advice could not fairly be characterized as detrimentally misusing that information; "Rather, it is the only means by which an individual can adequately inform themselves of their legal position in relation to that information."

With these principles in mind, the Court of Appeal reviewed the board's censure decision on a standard of reasonableness and addressed whether, correctly interpreted, section 117 of the *Community Charter* precluded a board member from disclosing confidential board information to their own lawyer to obtain personal legal advice without prior authorization. The appellate court concluded that it did not.

The key words are the requirements in section 117 to "keep in confidence". In the Court of Appeal's view, confiding in a lawyer to obtain legal advice did not involve public disclosure, as "[a] lawyer is duty-bound by solicitor-client privilege to maintain confidentiality in all information provided by a client, and not to disclose it publicly."

Further, there was no evidence that the director had breached confidence by the misuse of confidential information. Rather, a board member, as with any citizen, has an interest in full and ready access to meaningful legal advice in matters of personal importance which depends upon full disclosure to their lawyer. The statute at issue was clearly intended to limit a board member's disclosure of confidential information to the public without authorization so that the board could function openly, optimally and productively.

However, the appellate court was unable to see how or why the prospect that officials might obtain personal legal advice in confidence in connection with confidential board matters could impair their ability to function. In particular, there should be no chilling effect from a functional perspective for municipal government officials to be fully legally informed.

In the result, the Court of Appeal concluded that neither the district's governing statute nor its related *Code of Conduct* could be interpreted to preclude a director from disclosing confidential information to a lawyer when obtaining personal legal advice.

The decision should provide some comfort to persons with roles in organizations that they may confide in a lawyer to obtain personal legal advice notwithstanding that it may involve the disclosure of the organization's confidential information. What steps may be taken thereafter, if any, should be made upon the advice of a lawyer who has been provided with the information. A PDF version is available for download [here](#).

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