

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pratt v. 3G Green Garden Group Inc.*,
2026 BCSC 1045

Date: 20260601
Docket: S241414
Registry: Vancouver

Between:

David Pratt and 3G Green Garden Group LLC dba Emerald Harvest
Plaintiffs

And

**3G Green Garden Group Inc., Emerald Harvest Inc., Robert Charles Higgins
and Sharon Elaine Higgins**
Defendants

And

David Pratt
Defendant by Counterclaim

Before: The Honourable Justice Thomas

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and the Defendant
by Counterclaim: L.C. Morrison

Counsel for the Defendants: C. Chisholm

Place and Date of Trial/Hearing: Vancouver, B.C.
May 28, 2026

Place and Date of Judgment: Vancouver, B.C.
June 1, 2026

[1] **THE COURT:** This is an application for production of documents that are subject to litigation privilege, redaction, and solicitor-client privilege.

[2] The parties have ongoing litigation in California on issues that overlap this action. The California action was filed June 15, 2022. This action was filed on March 1, 2024.

[3] There is an application to dismiss this action, that is the B.C. action, to be heard over three days commencing July 6, 2026, on the basis that it was commenced after the expiration of the limitation period.

[4] The plaintiff/application respondent sets out his position with respect to the documents he is refusing to produce and has redacted in his affidavit filed on May 22, 2026, at paras. 3–20:

Private investigator documents

3. Paragraph 1(a)(i)(A) of Part 1: Orders Sought in the Notice of Application seeks production of "the reports provided to [me] in April 2022, and the related correspondence with the private investigator including the engagement of the investigator and progress reports".
4. I understand that this request relates to paragraph 25 of my Affidavit #2 made in this proceeding on March 13, 2026, in which I describe retaining a private investigator in Canada.
5. My legal counsel in California, Michael Shklovsky, retained the private investigator on my behalf on March 14, 2022. The investigation report resulting from this investigation was prepared dated April 22, 2022, and a follow-up report was prepared dated April 29, 2022. Between the retainer of the private investigator and preparation of these reports, my counsel corresponded with the private investigator regarding the private investigator's work.
6. My purpose for having my legal counsel retain the private investigator was to obtain information about the defendants, and in particular 3G Green Garden Group Inc. and Emerald Harvest Inc., for the purpose of determining how they related to 3G Green Garden Group LLC ("3G LLC") and whether there was any factual foundation for a legal claim against them for any improper activity in relation to 3G LLC.
7. I did not at any time intend to use the private investigation reports as expert reports or evidence in any jurisdiction or to call the private investigator as a witness in any litigation.
8. I have not produced the private investigation reports and correspondence as part of my document production in the parallel litigation in California, nor have I disclosed the identity of the private

investigator, because my attorneys and I claim California attorney-client privilege and/or attorney work product doctrine protection over those documents and related information for the purposes of the California litigation.

9. I also claim litigation privilege over the private investigation reports and correspondence with the private investigator in the BC litigation. However, in the BC litigation only, I am willing to produce copies of the two private investigator reports dated April 22, 2022 and April 29, 2022, and the initial email string with the private investigator with the date and terms of their retainer, with the identifying information of the investigator and payment terms redacted, provided that the defendants agree that such voluntary production would not be a waiver of privilege over any additional documents or information in any jurisdiction.
10. Redacting the name and contact information of the private investigator is intended to protect the investigator's privacy given that my legal counsel retained the investigator only as a consultant and does not intend to call the investigator to testify as a witness in any litigation.

Forensic investigator documents

11. Paragraph 1(a)(i)(A) of Part 1: Orders Sought in the Notice of Application seeks production of "the reports from the forensic investigation that lasted into May 2022, and the related correspondence with the forensic accountant including commissioning their forensic review and progress reports".
12. I understand that this request relates to paragraph 26 of my Affidavit #2 made in this proceeding on March 13, 2026, in which I describe retaining a forensic accountant to understand the significance of the bank account statements and check images that I had obtained for 3GLLC.
13. My legal counsel in California, Michael Shklovsky, retained the forensic accountant on my behalf on February 28, 2022. The forensic accountant did not at any time prepare a formal report and I did not request that the forensic accountant do so. Rather, the forensic accountant prepared a set of topically organized and annotated spreadsheet tabs summarizing the banking records of 3GLLC and identifying potentially suspicious transactions, which I reviewed in mid-May 2022. Between the retainer of the forensic accountant and preparation of this spreadsheet, my counsel corresponded with the forensic accountant regarding the forensic accountant's work.
14. My legal counsel retained the forensic accountant to interpret the banking records of 3GLLC in order to determine whether there was any factual foundation for a legal claim against the defendants on the basis that they had misappropriated funds from 3GLLC.
15. It was my review of the spreadsheet in mid-May 2022, in conjunction with the facts that I had learned from the private investigation reports provided at the end of April 2022, that led me to conclude that there was a factual basis for legal claims against the defendants. The

spreadsheet includes some comments from me that were intended for my legal counsel for the purpose of obtaining legal advice about the contents of the spreadsheet.

16. I commenced litigation against the defendants in California on June 15, 2022 based on the factual information that I obtained from these investigations.
17. I did not at any time intend to use any materials prepared by this forensic accountant as expert reports or evidence in any jurisdiction or to call the forensic accountant as a witness in any litigation.
18. I have not produced the forensic accountant's spreadsheet and correspondence as part of my document production in the parallel litigation in California, nor have I disclosed the name of the forensic accountant, because my attorneys and I claim California attorney-client privilege and/or attorney work product doctrine protection over them and related information for the purposes of the California litigation.
19. I also claim litigation privilege over the forensic accountant spreadsheet and correspondence with the forensic accountant in the BC litigation, as well as solicitor-client privilege to the extent that the spreadsheet includes my comments for my lawyer. However, in the BC litigation only, I am willing to produce copies of the May 2022 version of the forensic accountant's spreadsheet and the initial email string with the forensic accountant with the date and terms of their retainer, with the identifying information of the forensic accountant, payment terms, and solicitor-client privileged information redacted, provided that the defendants agree that such voluntary production would not be a waiver of privilege over any additional documents or information in any jurisdiction.
20. Redacting the name and contact information of the forensic accountant is intended to protect the forensic accountant's privacy given that my legal counsel retained the forensic accountant only as a consultant and does not intend to call the forensic accountant to testify as a witness in any litigation.

[5] Essentially, he says that he was not aware that an action existed in B.C. until mid-May 2022 when he had information obtained from the investigation reports, which were provided at the end of April 2022, and the forensic accounting reports or spreadsheets, which he obtained in mid-May 2022. I understand that he made notations on the spreadsheet at that time which were sent to his lawyer in order to obtain legal advice.

Relevance of the Evidence

[6] The question is whether the plaintiff knew or should have known that the limitation period commenced earlier. He says that he did not know until mid-May 2022 until he had reviewed the accounting of it in conjunction with the investigation reports. Therefore, in my view, the plaintiff has put his state of mind and knowledge in issue with respect to the commencement of the limitation period based on information that he provided to the investigator and accountant, and the information that they provided to him.

Litigation Privilege

[7] The plaintiff says that by providing the initial retainer, correspondence, the investigation reports of the investigator, and the retainer and spreadsheet provided by the accountant, the defendant can fully explore these issues.

[8] The correspondences occurred after March 1, 2022. Therefore, any issues discussed between the parties could not be relevant to the expiration of the limitation period since they would occur within a period of time that the action could have been filed.

[9] There is no dispute that there has been an implied waiver. The basic legal principle governing this situation is the longstanding principle in equity that fairness and consistency demand disclosure where a party seeks to use privilege as a sword to justify or to explain an issue and then as a shield to limit disclosure of information relevant to that issue.

[10] With respect to partial disclosure, I note:

a) the case of *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 149:

[149] As already discussed, one way in which a party may be found to have impliedly waived privilege is by disclosing part of a privileged document or a portion of a category of privileged documents. In such a case fairness requires disclosure of all communications on the same subject so that the other party can ensure that the partial disclosure does not create a misleading picture: see *O'Scolai v. Antrajenda*, 2008 ABQB 77; 927966 *Ontario Ltd. v. Cogenix Development Corp.*, [2000] B.C.W.L.D. 20 (S.C.).

- b) the decision of Justice Walker in *Pacific Sands Beach Resort Ltd. v. Co- Operators General Insurance*, 2025 BCSC 858 at paras. 23–30:

[23] Waiver of a privilege may be implicit without a voluntary intention to waive where the holder of the privilege conducts themselves in such a way, or takes a position in relation to privileged materials that would be inconsistent with maintaining the privilege, and it would be unfair to allow the privilege to subsist. Thus, waiver of privilege as to part of the communication will be held to be waiver as to the entire communication. This may occur by, for example, selectively disclosing part of a privileged document or a category of privileged documents on a particular subject but withholding the remainder of the document or other documents on that same subject. In these circumstances, to uphold the privilege over the remaining communications would be unfair because the opposing party and the court would be deprived of access to the full narrative: *Meng*, *supra* para. 37, citing *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795, at para. 143.

[24] Where selective disclosure of privileged documents has occurred, in limited circumstances fairness and consistency require the disclosure of all documents on the same subject to ensure that the partial disclosure does not give an unfair advantage of creating a misleading picture: *Meng*, *supra* at para. 38. Generally speaking, in cases where fairness is invoked in support of a finding of waiver, there has been some manifestation by the privilege holder of a voluntary intention to waive the privilege, at least to some extent: *Graham*, *supra* at para. 48.

[25] Waiver can also be implied where a litigant relies on legal advice as an element of their claim or defence. The privilege which would otherwise attach to that advice is lost. *Meng*, *supra* at para. 36 citing *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218, at 220 (S.C.).

[26] If a party advances a state of mind defence or relies on legal advice to justify their conduct, a waiver may be inferred. The party's state of mind as to its understanding of its legal position or advice received will generally not be sufficient to amount to implied waiver. The party must voluntarily inject itself into the litigation legal advice it received or its understanding of the law before waiver can be implied: *Soprema*, *supra* at paras. 22, 48, and 49; *Graham*, *supra* at para. 47.

[27] Where waiver of privilege has been found, loss of privilege is only in relation to that particular subject matter over which privilege has been waived. This limit ensures that waiver extends only as far as necessary to ensure fairness: *Meng*, *supra* para. 39; *Siegerist*, *supra* at para. 39.

[28] In my view, the defendant impliedly waived solicitor-client privilege and the other claimed privileges over the subject matter of the disclosure when it chose to selectively waive privilege over the 454 documents that were previously claimed to be privileged. I appreciate the defendant's argument the defendant has maintained privilege over the documents remaining in Part 4 of the list of documents, but that in my view, is only relevant to whether the defendant has explicitly waived privilege.

[29] Where privilege is waived, production of all documents relating to the acts contained in the communication will be ordered. The policy reasons for this incursion into the sphere of privilege are fairness and consistency. A party cannot cherry pick favourable aspects of privileged communications without disclosing the entirety of the communication: See *FCAS v. CES*, 2023 BCSC 1098, at paras. 8 and 9, and the authorities cited therein; See also, *McDermott v. McDermott*, 2013 BCSC 534, at paras. 113 and 114.

[30] While this does not mean that in every case fairness and consistency will require further disclosure, in my opinion the circumstance of this case require further disclosure to the plaintiffs. It would be unfair to permit the defendant to pick and choose which documents to potentially put before the court to defend against the claims while claiming privilege in respect of other related communications that might be relevant to these proceedings.

[11] It would have been helpful to have been provided the initial retainer letters, as well as the accounting report and investigation reports. However, the plaintiff has not disclosed these documents to the court.

[12] In my view, the partial disclosure provided by the plaintiff is inadequate because it allows him to pick and choose what information to disclose while deriving the benefit of the document upon which the sword is based. Correspondence and discussions after March 1, 2022, could be relevant to both his assertion that it was not until mid-May that he discovered the limitation period and to whether he was or should have been aware of it earlier.

[13] In saying this, I emphasize that my decision is not based on an assessment of the relevance of documents because I do not have the documents before me, but rather on the longstanding principle of fairness and consistency which demands full disclosure where a party seeks to use a privileged document as a sword to justify or explain and then as a shield to prevent disclosure of information upon which the disclosed document is based.

[14] In these circumstances, full disclosure of both the accountant's and investigator's files and correspondences with the plaintiff and his agent are required in addition to the reports. This includes any draft documents prepared by the investigator and accountant.

Privilege over the Name of the Investigator and Accountant

[15] The plaintiff seeks to redact the names of the investigator and accountant because they were not retained as experts. They say that their identities are irrelevant and, therefore, should not be produced. I disagree. The fact that the plaintiff does not expect to call the investigator and accountant as experts at trial is not dispositive of this issue.

[16] The information provided to them and the correspondence with them are producible. Therefore, their identities are potentially relevant. I see no true prejudice to disclosing their identities to the defendants. Therefore, their names are not to be redacted.

Solicitor-Client Statements

[17] The plaintiff says that the notations that he wrote on the accountant's spreadsheet, which appear to have been made at the time he realized there was a potential cause of action, were provided to his solicitor for purposes of legal advice and, thus, subject to solicitor-client privilege and not producible.

[18] It is true that these notations are subject to solicitor-client privilege. However, the question is whether part of this privilege has been waived by putting his state of mind into issue with respect to whether and when he had a valid cause of action in British Columbia.

[19] Counsel provided one authority that is relevant to this issue, that of *Huang* at para. 142:

[142] There are several cases where a party has been found to have impliedly waived privilege by relying on privileged information to explain or justify its conduct that do not involve the party putting in issue its understanding of the law or its reliance on legal advice. In *Biehl v. Strang*, 2011 BCSC 213, the defendant, Mr. Strang, claimed during an examination for discovery that he had not had input into the drafting of a statement of defence by his former lawyer. This was found to amount to an implied waiver of the communications between Mr. Strang and that lawyer concerning any approval that may have been given with respect to the contents of the pleading. The actual legal advice Mr. Strang received was not in issue, nor was Mr. Strang's understanding of the law. Similarly, in *Canadian Community*

Reading Plan Inc. v. Ewanchyna, 2008 BCSC 1241, the defendant led evidence that he had not been aware that a petition had been filed and blamed his lawyer for erroneously filing it. The court found that the defendant had impliedly waived privilege over the portions of his lawyer's file related to their meetings and discussions. Again, the actual legal advice he received was not an issue, nor was his understanding of the law. Also, in *Langret Investments S.A. v. McDonnell* (1995), 1995 CanLII 774 (BC CA), 13 B.C.L.R. (3d) 333 (C.A.), the defendant sought to excuse his non-attendance at an examination for discovery on his belief that the trial would not proceed as scheduled. He disclosed that his belief was based on a communication from his lawyer. This was found to amount to an implied waiver of the communication.

[20] Counsel also attempted to provide me with an excerpt of the accountant's spreadsheet that contained the notations in issue. Unfortunately, they were illegible, so I did not admit them.

[21] Both counsel agree that solicitor-client privilege was a near absolute privilege and that they had not fully canvassed the law on this issue. This leaves me in the position of conducting my own research into the law, perhaps asking counsel to comment on my research and then deciding the issue without knowing the contents of the communications. In my view, this puts the court in an awkward situation that perhaps could and should have been avoided.

[22] Any infringement upon solicitor-client privilege is a serious matter. An informed decision on this issue requires counsel to fully canvass the law and to provide a legible copy of the document. In my view, these concerns are sufficient that it would be inappropriate for me to decide this issue on the record and submissions before me. Therefore, I am adjourning the application with respect to solicitor-client privilege.

[23] I would ask that a new notice of application, response, and reply be filed and that a legible copy of the record be brought to the court for review by the presiding judge if required. The plaintiff may maintain privilege over this document, and it does not need to be disclosed to the defendants.

[24] Given the time constraints, counsel will apply to appear before me to decide the issue. If I can hear the matter in time for their application to proceed, I will do so. Otherwise, they may proceed to general chambers before another judge.

Costs

[25] In my view, the issue of litigation privilege and redaction of the names of the accountant and investigator was resolved in favour of the defendants. The plaintiff has the burden of establishing privilege. In my view, the deficiencies in the record rest primarily at the feet of the party with the burden to establish privilege, which in this case is the plaintiff.

[26] Therefore, unless there is an issue I am unaware of, costs will be to the defendants in any event of the cause for the hearing that occurred last Thursday.

[27] I would also ask that these reasons be ordered on an urgent basis to assist counsel in the event that I cannot hear the matter.

[28] Okay. Is there anything arising from that or does anyone wish to make submissions with respect to costs?

[29] CNSL C. CHISHOLM: Justice, if I may just clarify. With respect to the solicitor-client issue, my understanding was that that relates specifically to the comments on the spreadsheet. So is your order that the spreadsheet itself be produced with those redacted for now, or that the spreadsheet be withheld until that further application is heard?

[30] THE COURT: No, it would be redacted.

[31] CNSL C. CHISHOLM: Okay.

[32] THE COURT: You will receive a copy of the spreadsheet, but the notations made by the plaintiff will be redacted for now until the issue of any waiver of solicitor-client privilege is resolved.

[33] CNSL C. CHISHOLM: Thank you.

[34] THE COURT: Okay.

[35] CNSL L. MORRISON: If I understand correctly, we are to produce the investigative records sought by the defendants subject to such redactions as we consider necessary for solicitor-client privilege for now, and then we will set it down for another time?

[36] THE COURT: Yes.

[37] CNSL L. MORRISON: Okay.

[38] THE COURT: Thank you both.

[39] CNSL C. CHISHOLM: Thank you, Justice.

[40] CNSL L. MORRISON: Thank you, Justice.

“Thomas J.”