

Not Just a “Privilege” But a Right: Discovery of Documents and Privilege

William M. Holburn, Q.C.*

Introduction

Insurers typically investigate and obtain legal advice following the occurrence of a loss. But that is done with a concomitant desire that the investigative material, information developed by investigators or adjusters, and legal advice be protected from disclosure to opposing parties should litigation eventually ensue.

Plaintiffs’ counsel increasingly seek production of claims files in both first party situations (property, disability) and third party situations (casualty, occupiers’ liability, motor vehicle). The trend of the courts is increasingly to expand the categories of documentation and communications which are producible. The protection afforded by privilege cannot be obtained by the mere assertion of privilege; privilege must be supported by facts and proven by evidence. The key, then, to successful assertion of privilege is to make efforts from the outset to ensure that, to the extent possible, privilege is created and maintained.

Disclosure vs. Privilege

In the discovery process, parties to litigation are required to produce all documentation which is or has been in their possession or control relating to the matters at issue: e.g. B.C. Rule 26; Ont. Rule 30. Privileged documentation is exempt from the general rule requiring production. There is thus a conflict of two opposing principles, both of which are fundamental to the civil litigation process: (1) the right to full and timely discovery of the opposing party’s case; and (2) the right of a party to maintain the confidentiality of materials related to legal advice and litigation handling.

To some extent, there is a trend towards narrowing the scope of privilege (particularly “litigation privilege”) in favour of greater disclosure. Accordingly, it is increasingly important to take all available measures to create and to preserve privilege.

*Alexander Holburn Beaudin & Lang LLP, Vancouver, B.C.

Categories of Privilege

There are a number of bases of privilege recognized by law. Many of these will be encountered rarely, if ever, in the usual practice of an insurance adjuster or a claims examiner. So it should suffice merely to name a few of them, such as: statutory privilege; crown privilege; trade secrets; and confidential documents (e.g. documents or notes of communications that originated in confidence that they would not be disclosed, such confidence being essential to the relationship between sender and recipient).

There is no “adjuster privilege” or “insurance industry privilege”; but adjusters and insurers are in good company in this regard, bearing in mind that equally there is no doctor privilege, accountant privilege, clergy privilege, or journalist privilege.

The main recognized privileges are (1) solicitor-client privilege; and (2) litigation privilege. These go by various names, as will be discussed below. Until very recently, these privileges were sometimes classified as being just aspects of a single privilege, but they were sometimes classified as different privileges (and sometimes even separated into three or four categories).¹

The Exchequer Court in a long-standing leading case, *Susan Hosiery Ltd. v. MNR*² treated the privileges as two, in these terms:

As it seems to me, there are really two quite different principles usually referred to as solicitor and client privilege viz:

- (a) all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking, formulation or giving of legal advice or legal assistance (including the legal adviser’s working papers directly related thereto) are privileged; and
- (b) all papers and materials created or obtained specially for the lawyer’s “brief” for litigation, whether existing or contemplated, are privileged. ...

The first, (a), is what we would call “solicitor-client privilege” and the second, (b), is “litigation privilege”. This dual-aspect classification scheme was recently given the *imprimatur* of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, decided September 8, 2006³, the most recent and authoritative case on privilege. Although the case is chiefly concerned with “litigation privilege”, it necessarily deals with solicitor-client privilege also.

¹ See, for example, *Keefe Laundry Ltd. v. Pellerin Minor Corp.*, 2006 BCSC 1180, where the court dealt with “all three of the distinct kinds of lawyer-client privileges”, and named: “legal advice privilege”, “litigation privilege” and “lawyer’s brief privilege”.

² [1969] 2 Ex.C.R. 27, [1969] C.T.C. 353, para. 8.

³ 2006 SCC 39.

One important part of the case is that it directly states that the two privileges are distinct, and not “two branches of the same tree” (para. 7). Accordingly, older cases will have to be re-interpreted and re-assessed in light of the principles stated in *Blank*. Therefore, it is now probably best to think of only two lawyer-client privileges, not of three or more.

What is important to note about both of these privileges is that they do not afford a privilege against the discovery of *facts*. What is privileged is the *communications* or *working materials* that came into existence by reason of the desire to obtain legal advice or to deal with litigation. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if the party would otherwise be bound to give discovery of them.

Solicitor-Client Privilege (Legal Professional Privilege, Legal Advice Privilege)

This privilege has gone by several names, as noted in the heading. We will refer to it as “solicitor-client privilege”.

Solicitor-client privilege applies to direct communications between solicitor and client for the purpose of obtaining professional legal advice:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.⁴

Solicitor-client privilege arises any time a client seeks advice from a lawyer, regardless of whether or not litigation is contemplated. The communication must be intended to be kept confidential in order to be privileged. The privilege survives the death of the client (“once privileged, always privileged”). It aims to protect communications between the solicitor and the client to enable all citizens to have full and ready access to legal advice.

Solicitor-client privilege is a cornerstone principle of our legal system and a rule of substantive law (not merely a rule of evidence). The trend of the courts has been to strengthen, re-affirm, and elevate this privilege.⁵

The facts or documents which happen to be referred to in the solicitor-client communications are not privileged from discovery if the party would otherwise be bound to give discovery of them. Therefore, while the communication itself may be privileged, the facts referenced therein may not be privileged.

Solicitor-client privilege is powerful and thus it cannot be misused. For example, a person cannot cloak conversations or activity with solicitor-client privilege by the mere expedient of talking to a lawyer or acting through a lawyer.

⁴ *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241 (Ont. C.A.) at p. 321.

⁵ *Blank, supra*, note 3, paras. 24, 61.

Examples abound. A well-known insurance example, where the legal principles were ultimately expressed at length, is *General Accident Assurance Co. v. Chrusz*.⁶ There, an independent adjuster was retained by the insurer and directly reported to and received instructions from a lawyer who had been retained by the insurer to investigate a first party fire loss. The question was whether the independent adjuster was the agent of the insurer such that communications (reports) from the independent adjuster to the lawyer were privileged. In *Chrusz*, the day following the fire loss, the insurer retained an independent adjuster to investigate. Within a day of his retainer the adjuster reported a suspicion of arson. A lawyer was retained and the adjuster was directed to report directly to the lawyer. The insured ultimately filed proofs of loss and the insurer began to make partial payments. These payments were significant insofar as they were interpreted by the court to indicate that notwithstanding the initial suspicion of arson, the insurer was not contemplating a denial of coverage to the insured. Subsequent to these payments, a former employee of the insured visited the insurer's lawyer and provided him with a videotape and documentation, and with a sworn statement to the effect that the insured's claim had been fraudulently inflated.

The insurer then commenced an action for fraud against the insured and, by statement of defence and counterclaim, the insured claimed against the insurer, the adjuster and its former employee. In the discovery process, the insured sought production of the communications between the insurer and its lawyer, and between the adjuster and lawyer.

The court, per Mr. Justice Doherty (who dissented in part but whose analysis in respect of solicitor-client privilege was accepted by the majority), developed a functional analysis which he expressed as follows:

I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

⁶ *Supra*, note 4.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.⁷

[emphasis added]

The Ontario Court of Appeal ultimately held that the independent adjuster was not acting as the surrogate for the client (the insurer). Therefore, solicitor-client privilege could not be invoked.

The independent adjuster was retained to act on instructions from the solicitor and hence his function was not essential to the maintenance or operation of the client-solicitor relationship. Had the adjuster's presence been required to interpret the information or documentation so as to facilitate the lawyer's ability to advise the client, solicitor-client privilege would have extended to the communications between lawyer and adjuster, just as legal privilege extends to the services of accountants or others whose involvement is necessary to enable the lawyer to provide advice.

Although the independent adjuster was not considered to be the insurer's agent in the circumstances, the case leaves open the prospect that an independent adjuster could, in the right circumstances, be considered to stand in the shoes of the client such that communications with the independent adjuster would be protected by solicitor-client privilege.⁸

An example of this sort of agency relationship is seen in *Lamey (litigation guardian of) v. Rice*.⁹ In that case, a lawyer defending a motor vehicle case asked an adjuster to prepare a written statement and two reports, in order to advise the client. The adjuster produced the documents in order to assist the lawyer in giving advice; the adjuster and lawyer were not a mere conduit. The adjuster's documents were thus protected by solicitor-client privilege.

Many other scenarios can be posited and mooted, and many have already been litigated. Ultimately, the result comes down to the application of the well-settled criteria for the privilege to the facts at hand. Disputed claims of privilege are dealt with on a document-by-document basis, and the solicitor-client privilege criteria are applied to each document.

Litigation Privilege (Solicitor's Brief, Lawyer's Brief, Solicitor's Work Product)

This privilege has also been known by several names. We will call it "litigation privilege".

⁷ *Ibid.*, at paras. 120 - 122. Depending on the circumstances, this sort of work by a third party might be protected by litigation privilege, which is discussed below.

⁸ The functional analysis from *Chrusz* was endorsed by Kirkpatrick J. in *Hoy v. Medtronic, Inc.*, [2001] B.C.J. No. 1332 (Q.L.) (S.C.).

⁹ (2000), 190 D.L.R. (4th) 486 (N.B.C.A.).

Litigation privilege relates to the process of litigation. It is based on the need to provide a protected area to facilitate investigation and preparation of a case for trial by an adversarial advocate, free from intrusion and inspection by the opposing party. Accordingly, it comes to an end when the litigation, or the prospect of it, ends.

Litigation privilege applies only where (1) there is a reasonable prospect of litigation and (2) the document in question was produced for the dominant purpose of preparing for such litigation:

... such documents are protected where they have come into existence after litigation is commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining legal advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.¹⁰

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.¹¹

In order to be in “reasonable prospect”, litigation must be something more than a mere possibility, but it need not be a certainty.

The second factor is that the document must have been for the “dominant purpose” of litigation. The Supreme Court of Canada in *Blank* has just re-affirmed “dominant purpose” as the correct standard.¹² Recognition by an adjuster that litigation is a possibility is insufficient to maintain a claim for privilege over the adjuster’s reports where there are reasons for the investigation or report other than for use in litigation:

The fact that litigation is a reasonable prospect after a casualty, and the fact that the prospect is one of the predominant reasons for the creation of the report is not now enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.¹³

¹⁰ *Wheeler v. Marchant* (1881), 17 Ch. D. 675 at p. 681. The recent judgment of the Supreme Court of Canada in *Blank, supra*, note 3, is merely a reiteration of the well-settled principles, such as this.

¹¹ *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.) at para. 20.

¹² *Blank, supra*, note 3, at paras. 59, 60.

¹³ *Shaughnessy Golf and Country Club v. Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (C.A.). However, in certain cases the courts have accepted, particularly in the case of catastrophic injury, that all of the insurer’s investigative efforts, from the moment of notification of the accident, were for the defence of reasonably anticipated litigation, e.g., *Krusel v. Firth*, [1992] B.C.J. No. 2926 (Q.L.) (S.C.).

Where adjusters are retained to investigate a third party liability claim, the prerequisites that litigation be in reasonable prospect and that the investigation be for the dominant purpose of litigation is usually¹⁴ but not invariably¹⁵ assumed.

In many situations, the adjuster's investigation is performed for multiple purposes, only one of which is for use in litigation. As was stated by the British Columbia Court of Appeal in the leading case of *Hamalainen (Committee of) v. Sippola*:

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 is 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 which 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.¹⁶ [emphasis added]

There are, no doubt, hundreds of cases on the topic of litigation privilege and the application of the established legal principles to the specific fact scenarios.

One example of the bright line in the continuum is seen in *Shaughnessy Golf and Country Club v. Uniguard Services Ltd.*¹⁷ There, two weeks after the fire, all of the matters other than the subrogated claim had become insignificant. The emphasis thereafter was on pursuing the subrogated claim even though the identity of the defendants had not yet been determined with certainty. Hence, documents prepared after the two week period were privileged. Documentation produced or prepared by the adjusters in the initial two week period was not privileged.

But timing alone does not always support privilege, as was learned in *Kaiser v. Bufton's Flowers Ltd.*¹⁸ The court there declined to accept that the timing of the preparation of the reports (following commencement of subrogation) clothed them with privilege, and noted that to so find would create the risk "that counsel can simply create the illusion of privilege by delaying the release of investigatory reports until after an action has been initiated".

¹⁴ *Wuest v. C.N.K. Holdings Ltd.*, [1996] B.C.J. No. 2880 (Q.L.) (S.C.), *Catherwood v. Heinrichs*, [1995] B.C.J. No. 2658 (Q.L.) (S.C.).

¹⁵ *Martin v. Blackcomb Skiing Enterprises Ltd.*, [2001] B.C.J. No. 2482 (Q.L.) (S.C.).

¹⁶ *Hamalainen, supra*, note 11, at para. 24.

¹⁷ *Supra*, note 13.

¹⁸ [1993] B.C.J. No. 1695 (Q.L.) (S.C.).

Even if timing is not a problem, the substance or contents of the document are important factors too. *Kaiser* also held that adjuster's reports which serve a dual purpose may be severed such that those portions which meet the test for litigation privilege can be redacted and only those portions which do not meet the test would be producible.¹⁹

A contrary result arose in *Laing Property Corp. v. All Seasons Display Inc.*²⁰ Although the evidence generated in the initial investigation of the fire provided a reasonable prospect of subrogated recovery litigation very early in the post-loss investigation, so that the subrogation investigation and reports generated in relation thereto were privileged, the adjuster had continued to "wear two hats" insofar as he continued to adjust the claim while pursuing the subrogation investigation and had combined both aspects into his reports. Separate reports on these two distinct aspects of the matter could have been prepared but were not.

The court rejected the argument that a document that contains some reference to a subrogation matter becomes a privileged document, and noted that it is the purpose for which the *document* came into being and not just *some of the information* within it, that determines the privilege. The court held the mixed reports to be producible in their entirety as it could not be said that they had been prepared for the dominant purpose of litigation.²¹

Not only content, but also context, may have an effect on the claim for privilege. The adjuster's dealings with the plaintiff can have a crucial effect on whether or not his reports will attract privilege. For instance, in *Martin v. Blackcomb Skiing Enterprises Ltd.*²², which involved a claim for personal injuries, the adjuster received instructions from the insurer to fund the plaintiff's rehabilitation and to attempt to resolve the claim. Over the two year period which followed he continued to meet with the plaintiff and to arrange for funding of her expenses for rehabilitation, home care, wage loss, and the payment of a temporary replacement worker. The plaintiff retained counsel after being alerted by the adjuster of the impending expiration of the limitation period. Counsel was appointed but negotiations were left to continue between plaintiff and adjuster. Payment of rehabilitation costs continued after the commencement of action (April 2000) until December 2000 when all further funding was refused.

With respect to the reports following commencement of action (in April), the court noted that the action was commenced to avoid a limitation problem, not because the non-adversarial approach was not working or that litigation was now necessary. All reports prepared during that April-December time frame were producible. Reports produced subsequent to the insurer's decision to cease funding (December) were deemed to have been made in reasonable contemplation of litigation, and for the dominant purpose of such, and hence, were privileged.

¹⁹ *Sydor's Hardward Co. Ltd. v. Saskatchewan Power Corp.* (1989), 34 C.P.C. (2d) 175 (Sask. Q.B.), which stands for the proposition that severance cannot save a dual purpose document from disclosure, was rejected as law in British Columbia.

²⁰ [2001] B.C.J. No. 1306 (Q.L.) (S.C.).

²¹ This would seem to differ from the earlier conclusion in *Kaiser* and other authorities that dual purpose reports could be redacted before production. The decision does not refer to the earlier case law on this point and has not subsequently been considered in relation to this aspect of the ruling.

²² [2001] B.C.J. No. 2482 (Q.L.) (S.C.).

Now consider how experts are retained in preparation for litigation. Very commonly, an expert is retained and asked to give an oral report to counsel. No doubt counsel makes some notes of the conversation. Most people would think that those notes are privileged. The question arose in an interesting way recently, in *Conceicao Farms Inc. v. Zeneca Corp.*²³

Conceicao (and others) were farmers who suffered from onion maggot damage. Conceicao sued Zeneca, the manufacturer of the pesticide that Conceicao alleged was defective. An expert, Dr. Grafius, testified at trial for Zeneca. It turned out that Dr. Grafius had been retained by previous counsel for Zeneca, who had transcribed their conversation, referred to in the “Memorandum” (when the file was transferred from Zeneca’s previous counsel to trial counsel, the Memorandum apparently was not included). Conceicao failed at trial, and eventually found out about Dr. Grafius’ prior involvement with Zeneca’s previous counsel. Conceicao sought production of the Memorandum, for use as fresh evidence on appeal. Zeneca declined, citing privilege.

At first instance, Gillese J.A., in chambers, ordered the Memorandum to be produced. But a full panel of the Ontario Court of Appeal disagreed. Conceicao’s argument was based on Ontario’s R. 31.06(3), which provides:

- (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert’s name and address, but the party being examined need not disclose the information or the name and address of the expert where,
- (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
 - (b) the party being examined undertakes not to call the expert as a witness at the trial.

Based on that wording, the Court of Appeal held that it was too late now to get the Memorandum:

...Most importantly, the appellants knew of Dr. Grafius’ final opinion months before trial. They had been served with a copy. They were entitled then to seek discovery of the foundational information for that opinion pursuant to rule 31.06(3). It appears that they did not do so.

In our view, there is no basis for them to do so now. Rule 31.06(3) applies to the discovery stage of litigation, which is closed. It gives the appellants no right to obtain disclosure after trial. Nor

²³ Decided July 26, 2006 per Gillese J.A., reported at [2006] O.J. No. 3012 (C.A., In Chambers), under the name *Horodynsky Farms Inc. v. Zeneca Corp.*, rev’d September 20, 2006 (Ont. C.A.), reported at [2006] O.J. No. 3716 (Ont. C.A.).

should they be otherwise entitled to disclosure at this late stage to cure their own failure to properly exercise their right to obtain this foundational information on discovery.

We do not think it is an answer to say that the appellants did not know of the memorandum until after trial. The rule does not give them the right to production of the memorandum but rather to obtain discovery of the foundational information for the findings, opinions and conclusions of Dr. Grafius contained in the memorandum. That is a right they had right up to trial. There is no basis in the rule or in fairness to give them the same right, by means of the production of the memorandum, now that the trial has been concluded. For the trial process to function fairly and properly, parties must exercise their right to obtain discovery at the discovery stage not seek to do so after trial.²⁴

Conceicao thus failed in its quest for disclosure of the Memorandum on the simple point that it was too late to seek discovery after the trial had concluded. Nonetheless, the issue of privilege was dealt with, but clearly as *obiter dicta*:

That is enough to dispose of the respondent's request for review. However, because counsel addressed it in argument, we offer this on one other issue: in our view, this case does not suggest a need to modify the rule of litigation privilege where experts are concerned. There is no doubt that litigation privilege attached to the March 14, 2000 memorandum. It was prepared by counsel as part of defending the lawsuit. That was its substantial if not its only purpose. Moreover as is made clear in the recently decided case of *Blank v. Canada (Minister of Justice)*, [2006] S.C.C. 39, which counsel forwarded to us, there can be no doubt that this privilege continues because the litigation continues.

Taking as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundational information in the document is available under rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of properly privileged information that is often intertwined with discoverable information in the lawyer's work product.²⁵

²⁴ *Ibid.*, [2006] O.J. No. 3716, at paras. 17-19.

²⁵ *Ibid.*, at paras. 20-21.

Based on that, it seems that litigation privilege would have been a trump card that would have precluded disclosure of the Memorandum in any event.

As an ancillary comment, note that an expert's working papers are producible, i.e. privilege is waived, when the expert is called to the witness stand to testify.²⁶ Copies of draft expert reports held in the solicitor's file also become producible.²⁷

Conclusions and Issues Arising

One object lesson in this field is that litigation privilege cannot be created by bluffing or by puffery that the documentation was produced for the dominant purpose of litigation. Rather, it is essential that insurers, adjusters, and counsel, structure the claims-handling procedure so that, from the outset, their files receive the maximum amount of protection possible.

To minimize the possibility that adjusters' early reports will be producible, it may be useful to have counsel assigned at the earliest possible date and to have the adjusters' reports directed to counsel who can, in turn and with minimal cost, forward these on to the insurer. Similarly, it may be useful to have experts and investigators retained by counsel and not by the insurer or the independent adjuster. Of course, the use of counsel as an intermediary cannot act as a cloak of privilege. Substance, not mere form, still matters. The mere process of running the adjuster's reports through the lawyer's office will not attract privilege to the report. This is just "laundering". On the other hand, if in substance the adjuster is providing the reports to the lawyer in order to obtain legal advice on behalf of the client (the insurer) and the adjuster is doing something central to the solicitor-client relationship, then privilege will likely arise with respect to the report.²⁸ Much the same applies to the retaining of experts by counsel.

Further, there is nothing to be gained by reflexively putting a note to file that it is bound for litigation, or indiscriminately captioning documents as being "for dominant purpose of litigation", or adopting a standard practice of considering all matters to have a prospect of litigation.

Such patently transparent attempts to create privilege are more likely to backfire and even detract from documents that are legitimately privileged.

In the case of first party property claims where there is a prospect for subrogation, adjusters should create separate files and do separate reports. Files and reports should be segregated, for example, between those which address coverage, those which deal with the adjustment process, and those which deal with potential subrogation.

²⁶ *Vancouver Community College v. Phillips, Barratt* (1987), 22 B.C.L.R. (2d) 289 (S.C.). See also *Coffin v. Sanford* (2003), 214 N.S.R. (2d) 199 (N.S.C.A.); *Browne v. Lavery* (2002), 58 O.R. (3d) 49, 37 C.C.L.I. (3d) 86 (Ont. S.C.J.); *R. v. Stone* (1999), 173 D.L.R. (4th) 66 (S.C.C.). In *Browne* it was held that the disclosure should occur pre-trial.

²⁷ *Vancouver Community College v. Phillips Barratt (No. 2)* (1987), 28 C.L.R. 277 (B.C.S.C.).

²⁸ For example, *Lamey, supra*, note 9.

As general advice, the best course is probably for adjusters to write separate reports, one to discuss privileged matters and another to discuss non-privileged matters. While it may be possible to succeed in chambers disputes over dual-purpose reports (e.g. as in *Kaiser, supra*), it is preferable to avoid that sort of dispute altogether - by writing separate reports.

Adjusters should document any early signs that litigation may be on or near the horizon. Specific note should be made of: any threats of litigation, references to lawsuits, or reference to retention of counsel by the third party claimant, including the date on which such threats or references were made. The file should note the date on which a third party claimant employs counsel, and the date on which the adjuster first suspects that the insurer will ultimately deny the claim or, in the case of subrogation, that there is a potentially actionable cause of action, even if the identity of the defendant has not yet been ascertained.

Where settlement negotiations are conducted by the adjuster within the context of a liability claim, the adjuster should prepare the file and reports with a constant awareness of the risk of potential disclosure. Opinions as to liability should be kept to a minimum, and where necessary, should be strictly segregated from reports pertaining to quantum.

Another interesting problem is the duration of litigation privilege. It is well-accepted that litigation privilege expires with the litigation. That was the issue in *Blank*, where the key point at stake was whether documents created for litigation A were producible in litigation B. In *Blank*, the problem arose because Blank had been charged for various regulatory pollution-related offences, which were eventually quashed. Blank then sued the federal government for fraud, conspiracy, perjury, and abuse of prosecutorial powers. To support his action, Blank sought disclosure of documents that had been generated in the pollution offence litigation, a demand that the government resisted on grounds of litigation privilege.

At para. 34, the Court said:

... Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have “terminated”, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

However, the Court also noted at paras. 38-41:

As mentioned earlier, however, the privilege may retain its purpose – and, therefore, its effect – where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding “the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim”

At a minimum, it seems to me, this enlarged definition of “litigation” includes separate proceedings that involve the same or related parties and arise from the same or related cause of action

(or “juridical source”). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

As a matter of principle, the boundaries of this extended meaning of “litigation” are limited by the purpose for which litigation privilege is granted, namely, as mentioned, “the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (Sharpe, p. 165)...²⁹

... In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.

In *Blank*, the litigation privilege was held to have terminated in respect of lawsuit A (the offence-related litigation), so that the materials were producible in lawsuit B (Blank’s civil action).

A recent and instructive insurance-related case is *GS Hitech Controls Inc. v. York Realty Inc.*³⁰ GS Hitech had suffered a fire loss, claimed against its insurer, and even sued its insurer. GS Hitech then commenced a second action, in tort, against various defendants. One defendant sought production of GS Hitech’s documents related to the action against the insurer, arguing that GS Hitech’s litigation privilege had now expired as the insurance litigation had resolved. The Alberta Queen’s Bench, although agreeing that the privilege “generally ends with the litigation” (para. 16), also held:

In this case the claim against the insurance company, and the present claim, both arise out of the same fire and concern the very same damage. As such, the two pieces of litigation are even more than “remotely connected”. The privilege over any documents prepared for the dominant purpose of prosecuting litigation will not expire until both pieces of related litigation are resolved.³¹

A variation on the issue is where the litigation remains ongoing but one party is no longer a litigant. In *Bourne (Guardian ad litem of) v. Lilly*,³² the action was dismissed against two of the former defendants (the owner and operator of one of the vehicles) pursuant to a summary trial. The plaintiff applied for production and inspection of documents in the possession of these former defendants on the basis that they were no longer privileged because the former defendants were no longer parties to the action. Counsel for the remaining defendants did not know the contents of the documents over which privilege had been claimed, but were concerned about their production because they shared a common interest with the defendants who had been

²⁹ This reference is to: Sharpe, Robert J., “Claiming Privilege in the Discovery Process”, in *Law in Transition: Evidence*, [1984] Spec. Lect. L.S.U.C. 163.

³⁰ 2005 ABQB 769.

³¹ *Ibid.*, at para.16.

³² [2004] B.C.J. No. 2049 (S.C.).

dismissed from the action with respect to the injuries that the plaintiff allegedly sustained. The court commented that, when anticipating litigation, it is open to defendants to share privileged information with each other without destroying litigation privilege. The court dismissed the plaintiff's application and stated as follows:

Privilege is a substantive right that cannot be treated lightly. In my view the plaintiff has not shown that the documents ought to be produced to him just because the defendants Nash are no longer parties to the action.³³

Accordingly, the dismissal of an action against one party only may not necessarily waive privilege to that party's documents.

Bourne may or may not be crystal clear as to whether litigation privilege comes to an end when a party to a lawsuit ceases to be a party. As can be seen above, at least part of the reason that privilege still pertained was because of "common interest".

Generally, if a party discloses a privileged document to a third party, then the party disclosing has waived its privilege to that document. It is well-recognized, however, that where there is a common interest between parties to an action, then disclosing a privileged document between those parties will not necessarily waive privilege.³⁴

Lawyers and adjusters must be careful then, if sharing privileged information, to make sure that there is in fact a common interest. In *Maier v. Fischer*,³⁵ the two defendants shared privileged adjusters' reports and statements taken from eyewitnesses to the accident. The court stated:

... there must be some connection between the type of documents where the privilege is claimed and the commonality of interest. In other words, if the reports deal with the situation which is entirely extraneous to the areas to where there is the commonality of interest, it seems to me that the waiver would apply.³⁶

Given the decision in *Maier*, both lawyers and adjusters should be cautious that any documents they share with another party clearly relate to issues on which there is true commonality of interest.

³³ *Ibid.*, at para. 19.

³⁴ *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), var'd on other grounds, [1981] 3 All E.R. 616 (H.L.). A recent motor vehicle case in B.C. that discusses common interest privilege is *Hopkins v. Wellington* (1999), 68 B.C.L.R. (3d) 152 (S.C.). Common interest privilege was also considered in the Ontario decision of *General Accident v. Chrusz*, supra, note 4.

³⁵ [2004] B.C.J. No. 233 (S.C.).

³⁶ *Ibid.*, at para. 11.

Determining if a Document is Privileged

It would be nice, and it would make life and business much easier, if there was a flowchart or checklist that one could use to determine if a document is privileged. Unfortunately, the reality is that the decision depends on the facts and nuances of each situation. Consider, for example, a motor vehicle third party liability situation. In the normal course of events, the insured would advise the insurer of the claim, the insurer would do investigations, and those documents would not be privileged. But suppose that the first call came from the injured person’s lawyer, retained at the scene, who advises that a claim is imminent. The insurer’s investigations, in that scenario, are arguably privileged.

Consider another example, in disability insurance. The insured makes a claim and the insurer denies coverage, based on a legal opinion that there is no coverage. In the usual course of events, in the action for a declaration of coverage, the opinion would be privileged. But, if the insured sues for damages for bad faith, and if the insurer puts up reliance on the opinion as a defence, then the opinion is no longer privileged.

Likely, any sort of algorithm would have too many “ifs” and “excepts” and “unlesses” to be of practical use. The fact that there are so many disputes, which make their way to motions judges, suggests that the issue does not lend itself to automation.

The best and only approach is actually not all that difficult anyway – simply examine each document on its own merits, and based on its content and context, ask if it meets the criteria for the privilege at stake:

<u>Solicitor-Client</u>	<u>Litigation Privilege</u>
<ul style="list-style-type: none">• confidential• communication• between lawyer and client• from lawyer as such• for legal advice	<ul style="list-style-type: none">• prepared for dominant purpose of litigation• litigation ongoing or in reasonable prospect

Finally, of course, the topic of privilege must be considered in conjunction with the topics of loss or waiver of privilege. Those are topics that have only been touched upon briefly here, and can merit their own paper.