Ontario Trial Lawyers Association
Long Term Disability Conference

"BREACHING SOLICITOR-CLIENT PRIVILEGE IN LTD ACTIONS"

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I N D E X

INTRODUCTION

While claims for solicitor-client privilege have long been recognized by the Courts, and the notion of solicitor-client privilege has existed for hundreds of years, recent developments have clarified and better illuminated the rules relating to solicitor-client privilege. The purpose of this paper is to explore current trends and developments, highlight, by illustrating a number of practical examples, how the Courts have dealt with requests for production of documents over which solicitor-client privilege and/or litigation privilege is claimed, and provide a few practice points to use when going forward.

WHAT IS SOLICITOR-CLIENT PRIVILEGE?

A convenient starting point for understanding solicitor client privilege is the Supreme Court of Canada's decision in *Descôteaux v. Mierzwinski*[1], in which recognition of the privilege as a substantive rule of law was established. Justice Antonio Lamer described the rule this way:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. Where the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so, and the choice of means of exercising that authority, should be determined with a view to not interfering

with it, except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively (in this respect, the Court is making reference to such things as access to information legislation).

Consequently, solicitor-client privilege is a substantive protection separate and apart from any evidentiary rule.

In *Blank v. Canada*[2] the Federal Court considered whether the rules ought to change when dealing with government officials who are obtaining information from counsel. The Court noted that the identity of the client is irrelevant to the scope or content of the privilege. While it would be logical to argue that an institutional defendant - such as a long-term disability insurer which has the capacity to organize its affairs in a way so as to clothe its file under the cloak of solicitor-client privilege - ought to be subject to a lower threshold, the case law indicates that whether the client is an individual, a corporation, or even a government body, there is no distinction in the degree of protection offered by the rule.

WHAT TYPE OF COMMUNICATION IS PRIVILEGED?

The scope of privilege is wide and encompasses all information passed between the lawyer and client. However, not all communications between a lawyer and client are privileged, only those where the client has in fact sought legal advice.[3] As well, in order to be privileged, the

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1 [1982] 1 S.C.R. 860

2 (2005), 48 Admin. L.R.(4th) 170; (2005), 286 FTR 44 This decision made its way to the Federal Court of Appeal and ultimately the Supreme Court of Canada

3 *Davies v. American Home Assurance Company* (2002), 60 O.R. (3rd) 512 at page 519

communication must occur in the course of seeking legal advice and with the intention that it be confidential.[4]

It is important to distinguish the facts contained within the communications from the communications themselves. A leading decision dealing with the disclosure of solicitor-client information remains the 1999 Ontario Court of Appeal decision in *General Accident v. Chrusz*[5], which held that solicitor-client privilege extends to communications in whatever their form may be, but it does not extend to facts which may be referred to in those communications, if those facts are otherwise discoverable and relevant. Thus, where a communication between solicitor and client takes place for the purpose of conveying or receiving information on matters of fact, the communication is not privileged and may be obtained on Discovery in civil proceedings. On the other hand, a privileged communication does not lose its privilege merely because it contains matters of fact which are not privileged. In this situation, the matters of fact can be severed from the privileged communication for the purposes of Discovery.[6]

Chrusz, although nine years old, remains instructive and is worthy of review in this paper. Although the subject matter of the underlying case concerned a fire loss, and did not relate to an LTD action, the principles outlined by the Court of Appeal would nonetheless directly apply in the context of LTD disputes. When *Chrusz* came before the Ontario Court of Appeal, it was at the Discovery stage and spawned a variety of questions regarding solicitor-client privilege and litigation privilege.

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4 The Law of Evidence in Canada, Sopinka, Letterman and Bryant (Toronto: Butterworths, 1992) at 642

5 (1999), 45 O.R. (3d) 321

6 *Blank v. Canada*, supra, at para. 29, quoting with favour solicitor-client privilege in Canadian law, Maines and Silver (Toronto: Butterworths, 1993) at 127

2006] S.C.J. No. 39

While the scope of this paper relates to solicitor-client privilege, it also remains helpful to review the definition of "litigation privilege" as set out by the Ontario Court of Appeal in *Chrusz*[7]:

> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case. Accordingly, it is somewhat of a misnomer to characterize this aspect of privilege under the rubric, (solicitor-client privilege), which has peculiar reference to the professional relationship between the two individuals.

After quoting several other sources, the Court of Appeal went on to note that there is nothing sacrosanct about litigation privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel of the zone of privacy. While solicitor-client privilege stands against the world, litigation privilege is a protection only against the adversary, and only until termination of the litigation.

There are several useful comments in *Chrusz* that, in my view, can be transposed from the fire loss situation to an LTD situation.

- "In my view, an insurance company investigating a policyholder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations, and even litigation, will follow as to the extent of the loss, but, until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured."[8]

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7 *Chrusz*, supra, at para. 22, adopting the description from Sopinka Letterman and Bryant in the Law of Evidence of Canada

8 *Chrusz*, supra, at para. 50

- "A claim to client-solicitor privilege in the context of litigation is in fact a claim that an exception should be made to the most basic rule of evidence which dictates that all relevant evidence is admissible. It is incumbent on the party asserting the privilege to establish an evidentiary basis for it. Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden."[9]

- "It is also necessary to consider the context of the claim…the insurer claims client-solicitor privilege against its insured in part in respect of the product of its investigation of a possible claim by the insured under its policy. The pre-existing relationship of the insured and insurer, and the mutual obligations of good faith owed by each to the other, must be considered in determining the validity of the insurer's assertion that it intended to keep information about the investigation confidential *vis a vis* its insured. The confidentiality claim cannot be approached as if the parties were strangers to each other."

CASE STUDIES

***Smith v. London Life Insurance Company*[10]**

This is a recent case released January 19, 2007 by the Divisional Court. OTLA member Jerry O'Brien successfully obtained an Order on motion requiring London Life to produce on Discovery its entire claims file arising from a prior action between the parties, including documents authored by its in-house counsel and other employees. London Life claimed litigation and/or solicitor-client privilege over the documents and appealed to the Divisional Court to set aside the Order below.

The background to the previous Court action was that Clarence Smith had commenced an action against London Life in July 1998 relating to disability benefits. He had been paid benefits following an injury in 1995 until those benefits were terminated in 1997. Ultimately, London Life reinstated the LTD benefits and the initial coverage action was settled. A separate action was commenced, restricted to aggravated and punitive damages, alleging a breach of a duty of good faith and fair dealing in the handling of the claim.

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9 *Chrusz*, supra, at para. 95

On Discovery in the punitive damages action, Plaintiff's counsel requested:

> I am asking for the entire file and all further claims and notes and e-mails with respect to the first action, including anything authored by Vicky Ramsay (in-house counsel at London Life).

This question was refused, as was a request for production of a litigation consultant's notes, and the request for production of a memo prepared by a London Life employee who assisted in-house counsel.

The motions judge concluded that the privilege that would normally prevent production of the documents had been impliedly waived. He felt that there had been an implied waiver because London Life alleged that all of its employees had in fact acted in good faith, and by making that allegation put its state of mind at issue.

On appeal, the Divisional Court referred itself to the Supreme Court of Canada decision in *Blank v. Canada*. The Divisional Court found that the litigation before the Court was so closely related to the initial action concerning payment of disability benefits as to warrant the continuation of any litigation privilege that may have attached to the contents of the claims file. Relying upon *Davies v. American Home Assurance Company*, the Court found that a pleading that London Life acted in good faith is not sufficient to constitute a waiver of litigation privilege.

Ultimately, the Divisional Court set aside the Order of the motions court judge and instead required London Life to deliver a better Affidavit of Documents which individually listed the documents for which privilege was claimed, particularizing the grounds on which the privilege was claimed, as required by the Rules. The Court did so because it did not find that there was sufficient information available with respect to the content of the litigation file to determine whether any privilege applied to any specific document contained in the file.

1207301 Ontario Inc. v. Zurich Insurance Company[11]

This case related to a fire loss dispute. The Plaintiff, which was a fine furniture company, appealed a Master's decision that Zurich Insurance Company did not need to disclose the legal opinion it obtained prior to its decision to deny coverage to the Plaintiff. Zurich argued that litigation privilege commenced when Zurich advised third parties of its decision not to provide coverage. The Plaintiff argued that litigation privilege only commenced when the Plaintiff issued its Statement of Claim.

Zurich had obtained a legal opinion that it relied upon when denying coverage. The preliminary opinion was dated February 5, 2001 and a final opinion was obtained February 16, 2001. On February 14, 2001, Zurich wrote to three non-parties: a salvage company, an insurance loss accountant, and a fire investigator, to advise that Zurich had determined that there would be no coverage with respect to the fire loss due to a material change in risk.

The Plaintiff relied upon *Samoila v. Prudential of America General Insurance Company*[12], alleging that Zurich waived privilege based upon questions and answers given at its Examination for Discovery.

The Court held that, if information was being gathered both for the purpose of investigation and assessment, as well as for the purpose of defending a possible claim, then, in the absence of convincing evidence that the dominant purpose was defence rather than investigation, the claim for litigation privilege fails. On appeal, the Court held that the Master's determination of when the "investigative door shut" and the "defence door opened" is a question of fact. The Court was not satisfied that the Master was clearly wrong in his finding of fact. The Master's Order was not disturbed.

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11 2003 CanLII 5014 (Ont. S.C.)

12 (2000), 50 O.R. (3d) 65

Hanna v. Royal & Sun Alliance Insurance Co.[13]

This case arose within the context of a claim against a homeowner insurer for theft losses. The Plaintiff brought a motion seeking an Order that Royal & Sun Alliance produce certain documents outlined in Schedule "B" of its Affidavit of Documents. Royal & Sun Alliance denied the claim because of alleged misrepresentations or fraud by the Plaintiff.

Royal & Sun Alliance delivered an Affidavit of Documents in which 42 separate documents were identified in Schedule "B" as documents over which the Defendant claimed privilege. The documents were identified by author, by addressee if applicable, by date, and by a general description of the document. The Court found that Royal & Sun Alliance had provided the bare minimum amount of information required to describe the documents in Schedule "B". While it may have been preferable, it was not required for Royal & Sun Alliance to provide more detail with respect to some of the documents.

The Court looked at the moment in time when litigation was contemplated and determined that it was reasonable for Royal & Sun Alliance to conclude that the claim might be fraudulent when its adjuster received a telephone call from the daughter of the Plaintiff, who suggested that her father's claim was fraudulent. Therefore, all documentation that was prepared after that date was protected by litigation privilege, whether or not it constituted communication to or from the solicitor.

Dumaliang v. Cheng[14]

This case was a Master's decision relating to a request for production of video surveillance tapes obtained by the Defendant in the context of a motor vehicle collision case.

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13 2004 CanLII 40664

14 2006 CanLII 36356

In this case, the Defendant retained a doctor to provide expert evidence as to whether or not the Plaintiff suffered a catastrophic, mental or behavioural impairment. As part of the information provided to the defence doctor, two surveillance tapes were sent depicting the Plaintiff's activity in July and August of 2003.

The defence doctor initially wrote in his report that he did review the surveillance tapes and that he relied on evidence relating to the July and August 2003 surveillance, which allegedly demonstrated that the Plaintiff shopped at a convenience store and carried a parcel.

The defence doctor later swore an Affidavit saying that he used imprecise language, in that he neither received nor reviewed the videotapes and that reference to them in his report was in error. What the doctor received and what he relied upon were simply still photos. The Plaintiff contended that it would be unfair for the Defendant to rely on still photos as evidence supporting an expert opinion, without providing the underlying videotape of that surveillance to establish the context in which the photos were taken, and whether there was evidence from that surveillance which contradicted the doctor's conclusions. The Court agreed with that submission. By providing the doctor with the surveillance photographs, the Defendants waived litigation privilege with respect to the photos.

The Defendants acknowledged that they had waived privilege with respect to the photos, but maintained that privilege remained in connection with the surveillance itself.

The Court concluded that the Defendant opened the door on what would otherwise be privileged evidence by providing still photos taken from the surveillance film and sharing it with an expert. The evidence, however, was not clear as to which surveillance photos were actually relied upon by the Defendants. Consequently, to the extent that surveillance photographic evidence was not relied upon by the doctor, but was simply referred to in the investigative reports, the surveillance videotape related to those photographs was not ordered to be produced. The

photographic evidence will not be introduced as evidence unless required for impeachment, and, if that occurs, the Defendant would be required to produce the videotape relevant to those events at that time.

Refco Futures (Canada) Limited v. American Home Assurance Company[15]

This was an insurance loss claim arising from losses that occurred as a result of dishonest or fraudulent acts committed by an employee. The Plaintiff moved for production of certain documents listed in the insurer's Affidavit of Documents, over which the insurer claimed litigation privilege. The factual issue to be determined was what moment in time did the litigation privilege begin with respect to the investigation of the claim. The investigation had been carried out by a forensic accountant and an insurance adjuster.

The Court noted that both parties agreed that the leading case was *Chrusz*.

The Court was reluctant to review all of the documentation to make specific determinations. What it did look at was a reporting letter of the adjuster to the insurer, which merely raised the question of the need for a legal opinion. The Court concluded that this letter was not sufficient to satisfy the dominant purpose test, and held that a more appropriate date for the commencement of the litigation privilege was the moment in time when defence counsel was retained. Prior to that time, the information gathering would appear to be more in the nature of investigation.

Mamaca v. Coseco[16]

This claim arose in the context of a denial of accident benefits after an alleged motor vehicle accident involving an unidentified driver. The Plaintiff moved to compel the Defendant insurer to

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15 2004 CanLII 19803 (Supreme Court)

16 2007 CanLII 9890

produce its entire claims file up to the date that the Statement of Claim was served, because there was an allegation of bad faith handling included in the claim. The Defendant relied on litigation privilege to resist production of documents created after the claim for benefits was denied and mediation was requested.

As the Court pointed out:

> What this motion illustrates is that, even after there is a reasonable contemplation of litigation, an insurer who continues to investigate and assess the Plaintiff's claim may be bound to continue to produce its internal claims documents, unless it can establish that they were created for the dominant purpose of that litigation as opposed to claims assessment.

The Court also considered whether litigation privilege, once established, can nonetheless be pierced if there is a *prima facie* evidence of bad faith.

The decision is a fairly lengthy decision by Master Dash. He refers himself to many of the same cases described in this paper.

Much of the decision is fact driven and not necessary to mention in this paper, but it provides a useful analysis of the appropriate approach to make when determining what was the date when there was a reasonable anticipation of litigation, has privilege been waived, and is there sufficient bad faith to prevent the insurer from hiding behind the cloak of litigation privilege.

Master Dash was critical of the blanket statements made by defence counsel during the course of Examination for Discovery, that at a particular moment in time there was a contemplation that litigation would ensue. In several parts of the decision, Master Dash indicates that it would be appropriate to have an actual claims handling individual give that evidence, rather than have it provided by the defence lawyer, which is no more than a conclusion without the necessary evidentiary basis. Master Dash noted:

> The onus is on the Defendant, as the party asserting privilege, to adduce such evidence. No internal documents have been produced indicating that the

> responsible claims handlers at the time contemplated litigation, reasonably or not, or that documents were created for such purpose. To the contrary, all the evidence suggests that the ensuing documents were created as part of the normal claims assessment process.

The Court went on to find that, even if it was wrong with respect to the moment in time when litigation privilege began, it would be appropriate to have the Schedule "B" documentation disgorged because "it would be wrong to allow the Defendant to hide evidence of bad faith behind the cloak of litigation privilege or else, as stated in *Blank*, evidence of one's own misconduct can never be exposed to the light of day."

Samoila v. Prudential[17]

In this case, Prudential stopped paying sickness and accident benefits to the Plaintiff, alleging fraud. The Plaintiff sued for reinstatement of the benefits and for damages caused for bad faith. After Discoveries, the allegations of fraud were withdrawn and the benefits were reinstated, but the Plaintiff continued on with the claim for damages for bad faith caused by the interruption in benefit payments.

The Plaintiff wanted production of the legal opinions received by Prudential. The Plaintiff also sought production of the Defendant's manuals and claims policies relating to the adjustment of sickness and accident benefit claims and the entire claims file relating to Samoila.

Prudential was prepared to produce manuals or policies relating to the adjustment process itself, but was not prepared to produce anything relating to the handling of a litigation claims file, nor the entire claims file, relying on litigation privilege.

Justice Brockenshire observed that bad faith actions against an insurer can only be proved by showing exactly how the company processed the claim. Consequently, he ordered that Samoila

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17 (2000) 50 O.R. 3rd 65

was entitled to the entire claims file. If Prudential had separate manuals dealing with how to handle potentially litigious claims, then those were also to be produced, as it factored into the state of mind of Prudential in its dealings with Samoila.

The Court dealt separately with the request for production of letters received from Prudential's solicitor by considering the questions and answers given at Prudential's Examination for Discovery. The Discovery transcript provided a factual basis for the conclusion that a legal opinion would normally be sought by a claims handler, before making a determination of whether or not to deny coverage on the basis of fraud.

The decision excerpts the relevant portion of the exchange from the Examination for Discovery, and it is probably helpful, in this paper, to reproduce the exchange as an illustration of best Discovery practices when this type of issue arises:

> Q. So in other words there is no minimum standard to adhere to where a claims person in an accident benefits unit investigates and concludes fraud is there?
>
> A. You'd certainly want to obtain a legal opinion.
>
> Q. Why would you want to do that?
>
> A. I guess that would be the minimum standard I suppose.
>
> Q. Was that the minimum standard at Prudential?
>
> A. I don't know what the minimum standard was at Prudential.
>
> Q. Is it at the Liberty Mutual?
>
> Ms. Neilson: Don't answer that.
>
> Mr. Leschied: Why not?
>
> Ms. Neilson: It's not relevant.
>
> Mr. Leschied: Well sir, are you suggesting that before you as the senior claims specialist at S.I.U. would accuse an insured of fraud in an accident benefit claim, you would rely on the advice of legal counsel?
>
> A. Yes, for sure.

Q. Because that's the reasonable thing to do?

A. They would know the legal climate better than I would.

Q. You would be there to provide the facts, and you would seek an opinion from legal counsel whether fraud existed or not, right?

A. Correct.

Q. Fraud in a legal sense.

A. As it pertains to the policy of insurance.

Q. In your review of the accident benefit file was a legal opinion sought before the insurer in this case accused Mr. Samoila of fraud?

A. I would assume so.

Q. Is that because it was good practice to do that?

A. It makes sense.

Q. Was it in fact being done?

A. I'd have to look through the file.

Based on this, the Court found that solicitor-client privilege was waived by the insurer and ordered production of any and all legal opinions obtained by the insurer relating to the denial of coverage.

PRACTICE POINTS

From the cases discussed in this paper, and related decisions and scholarly texts, several practice points are worthy of mention:

1. Borrowing from *Chrusz*, always ask for disclosure of any and all underlying facts contained within privileged documents which are not themselves otherwise protected by privilege.

2. Be satisfied that, when a claim for privilege is asserted, it is in fact solicitor-client privilege and not litigation privilege, as the test for production differs between the two, litigation privilege being construed more narrowly.

3. Based on *Dumaliang v. Cheng*, if still photos are sent to a defence doctor, request production of the underlying surveillance tape which provided the source of those photographs.

4. As distinct from other insurance company arrangements, many LTD insurers have extensive in-house counsel operations. The practice and procedure of these insurers may well be to have in-house counsel involved very early, which later sets up the insurer's assertion that the privilege attaches to a larger portion of the file. If that is the case, exploit this arrangement on Discovery by asking the right questions to set up the argument that the insurer adopts a position of denial early on, by involving lawyers, in breach of its duty of good faith and in breach of its first party responsibilities to a policyholder or insured.

5. When faced with a belligerent or uncooperative defence counsel who makes blanket assertions about the moment in time when there is a contemplation of litigation, hang that defence counsel on his or her own words, as was done in the *Mamaca* decision.

6. Don't abuse the bad faith pleading, but, using it judiciously, pursue the entire claims file of the LTD insurer when bad faith is an issue.

7. Think carefully about ways you can clothe your own client's documents with a valid claim of solicitor-client privilege. For example, I tell all my clients, right from the first meeting, that, if they intend to keep a diary chronicling their pains and medical visits, they should do so knowing that it is at my request, to inform me, and to form part of our overall solicitor-client communication. I resist subsequent attempts for production of the diary

by defence counsel on the basis of solicitor-client privilege, as it is a document that has been created and maintained to assist me with litigation.