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Newsletter

Insurance Law

July 2023



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The authors would like to thank M^{re} Alexandrine Touzin-Laberge for her invaluable assistance in the production of this newsletter.

Litigation Privilege in Insurance Law – A Brief Overview

Last December, in *Promutuel Assurance Boréale v. McKnight*¹, the Court of Appeal of Quebec outlined the various principles surrounding the privileged nature of a claims adjuster's report and investigation. Based on the previous decisions of the Supreme Court, the Court of Appeal was careful to reiterate the principles governing the admissibility in evidence of a claims adjuster's report, which is subject to certain exceptions. This newsletter provides a non-exhaustive overview of insurance litigation privilege.

At the outset, it should be emphasized that the purpose of litigation privilege is to ensure the effectiveness of the adversarial process by creating a zone of confidentiality in which the parties can prepare their arguments². This generic privilege covers documents whose *main purpose* is to be used in preparation for litigation: a document being useful for the purposes of litigation is not in itself sufficient for the privilege to become applicable³. Typical examples of elements covered by this privilege are the lawyer's file and verbal or written communications between a lawyer and third parties, including the insurer⁴.

In the field of insurance law, the courts have ruled on the application of litigation privilege on numerous occasions. Generally, claims adjusters' reports are presumed to benefit

from litigation privilege⁵, as is the insured's declaration, obtained by the insurer for the purpose of preparing the matter in dispute⁶. Nor can one compel disclosure, during an examination, of the content of discussions between an insured and the claims adjuster⁷. However, claims adjusters may be examined concerning facts of which they have personal knowledge, as well as objective facts that they have witnessed, and may be required to disclose photographs which they have taken⁸.

In addition, the preliminary report of an engineer, which is mandated by the insurer or the insured, to identify the cause and origin of a loss is covered by litigation privilege⁹. The insurer cannot be compelled to provide the elements protected by litigation privilege relating to the dispute contained in its file to third parties, including the syndic of a professional order¹⁰.

Litigation privilege is neither absolute in scope nor unlimited in duration. Litigation privilege is temporary and ends at the same time as the dispute that gave rise to it. It may retain its object and effect when the dispute that gave rise to it has ended, but where a related dispute remains pending or can be reasonably apprehended¹¹. Documents for which the preparation of litigation is only one of the purposes, without being the main purpose, cannot benefit from the protection offered by the litigation privilege¹². For example, a report prepared by the insured for the purpose of finding a solution following a loss to avoid future problems and improve internal processes is not a document covered by litigation privilege¹³.

Litigation privilege is subject to clearly defined exceptions, which include exceptions relating to public safety, the innocence of the accused and criminal communications, and disclosure of evidence of abuse or misconduct by the party claiming litigation privilege¹⁴.

In addition, the party benefiting from litigation privilege may waive it. The courts have established that a waiver occurs when a privileged party transmits a privileged document to the other party, only to interrogate the other party on its content¹⁵.

Similarly, including the content of a privileged document in a procedural document constitutes a waiver of the protection offered by litigation privilege¹⁶. On the other hand, the mere fact of revealing the existence of a document in a testimony is not sufficient to constitute a waiver¹⁷, whereas the fact that a claims adjuster consults one of his reports when testifying constitutes a waiver of the protection afforded by such privilege¹⁸. Barring circumstances deemed exceptional by the court¹⁹, a party's tacit waiver of privilege must be voluntary, clear, and evident²⁰.

In summary, litigation privilege creates a presumption of non-disclosure that applies to any document prepared in contemplation of existing or reasonably apprehended litigation. However, such privilege is subject to various exceptions, and the privileged party may waive it.

¹ 2022 QCCA 1735, para. 51 to 57.

² *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, para. 63. Litigation privilege is distinct from solicitor-client privilege. The latter, which is broader in scope, protects communications between a professional and his or her client, and is intended to protect the relationship between the parties. Solicitor-client privilege subsists at the end of a dispute, whereas litigation privilege lapses with the dispute.

³ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, para. 59-60.

⁴ *Lizotte v. Aviva Insurance Company of Canada*, *supra*, note 2, para. 19.

⁵ *Promutuel Assurance Boréale v. McKnight*, *supra*, note 1, para. 55.

⁶ *Aviva, compagnie d'assurances du Canada v. Sherbrooke (Ville de)*, 2016 QCCQ 6901, para. 41.

⁷ *Zurich du Canada, compagnie d'assurances v. Collard*, J.E. 2002-1578, para. 31.

⁸ *Labrecque v. Hôtel Brossard inc.*, 2016 QCCS 4753, para. 15 to 18.

⁹ *Desjardins Assurances générales v. Groupe Ledor inc., mutuelle d'assurances*, 2014 QCCA 1501, para. 9; *Construction Généphi inc. v. Ville de Laval*, 2019 QCCA 1824, para. 3.

¹⁰ *Lizotte v. Aviva Insurance Company of Canada*, *supra*, note 2, par. 29 to 31.

¹¹ *Blank v. Canada (Minister of Justice)*, *supra*, note 3, para. 37 and 38.

¹² *Compagnie d'assurances AIG du Canada v. Solmax International inc.*, 2016 QCCA 258, para. 4-5.

¹³ *Zurich Insurance Company Ltd. (Canadian Branch) v. A.H. Lundberg Systems Limited*, 2022 QCCS 390, para. 55; *AXA Assurance inc. c. Val d'or (Ville)*, C.S. Abitibi, no. 615-05-000338-982.

¹⁴ *Lizotte v. Aviva Insurance Company of Canada*, *supra*, note 2, par. 41.

¹⁵ *Axa Assurances inc. v. Pageau*, 2009 QCCA 1494, para. 8.

¹⁶ *Union canadienne (L'), compagnie d'assurances v. St-Pierre*, 2012 QCCA 433, par. 42.

¹⁷ *Fortier Auto (Montréal) ltée v. Brizard*, 2000 CanLII 11335 (QC CA), para. 29.

¹⁸ *Fiset-Trudeau v. Compagnie mutuelle d'assurances Wawanesa*, 2017 QCCS 5071, para. 28.

¹⁹ *Bédard Martin v. Intact, compagnie d'assurances inc.*, 2019 QCCS 5708, para. 49 and 61.

²⁰ *Union canadienne (L'), compagnie d'assurances v. St-Pierre*, *supra*, note 19, para. 51.

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