

Privileged Documents, the “Dominant Purpose” Test and Its Application in Insurance Cases

By Alain Olivier



An insurance file typically follows a long and complex process that begins with the insured's claim and may result in a trial before a Court of law. Following the claim, an insurer will retain the services of a claims adjuster to investigate the circumstances surrounding the loss. In light of the adjuster's report(s), the insurer will decide whether to cover all or part of the insured's claim or to deny coverage. The insurer may also seek advice from its lawyers if the file presents particular difficulties from a legal standpoint.

It is equally possible that the insurer's lawyer will retain the services of an adjuster on his own initiative to investigate the circumstances of the loss. The report(s) will then be returned to the lawyer and will help him in making a recommendation as to whether or not the insured's claim should be covered.

As one can see, the claims adjuster's report(s), and the lawyer's recommendations regarding coverage, are key elements in an insurance file. It is therefore imperative to determine which documents are protected by professional privilege and to what extent.

In Quebec, the Courts give considerable importance to the protection of legal privilege, especially in the context of a litigation file. However, certain recent developments in the case law of the common law provinces suggest that legal privilege should not apply to the documents and reports that were prepared during the investigation and assessment of a claim, but were not made in anticipation of litigation. Should a similar approach be adopted in Quebec?

communication that is prepared by the client (or a third party retained by him) for his lawyer or at his request.²

In accordance with the general rule, a verification report that is prepared by the tax authorities to determine a taxpayer's liability³ or a report prepared by the chief municipal inspector for gas and plumbing installations following a fire⁴ were not drafted for litigation purposes. The Courts therefore do not consider them to be privileged documents.⁵

The “Dominant Purpose” Test

The Quebec Courts have applied the legal reasoning which has been developed in common law jurisdictions and notably by the English House of Lords in the case of *Waugh v. British Railways Board*.⁶ That case

The Admissibility of Evidence

Article 2857 of the *Civil Code of Québec* (hereafter the “CCQ”) provides that the evidence of any fact relevant to a dispute is admissible and may be presented by any means. However, certain documents are privileged and are therefore exempt from the general rule.¹ For example, solicitor-client privilege protects any written



LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

¹ In fact, article 9 of the Quebec *Charter of Human Rights and Freedoms* confers a “quasi-constitutional” protection to professional privilege (see *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Solosky v. R.*, [1980] 1 S.C.R. 821).

² L. Ducharme, *L'administration de la preuve*, 3d ed. (Montréal: Wilson & Lafleur, 2001) at 103-104.

³ *Québec (Deputy Minister of Revenue) v. Fava*, [1984] C.A. 639 (hereafter *Fava*).

⁴ *Federal Insurance Co. v. City of LaSalle*, [1985] R.D.J. 230 (C.A.) (hereafter *City of LaSalle*).

⁵ Note that the Quebec Courts have (albeit sparingly) applied the “dominant purpose” theory following the *Fava* and *City of LaSalle* decisions. See the following judgments: *Société d'énergie de la Baie James v. Lafarge Canada*, [1991] R.J.Q. 637 (C.A.), motion for leave to appeal to the Supreme Court of Canada dismissed, September 12, 1991; *Gerling Global cie d'assurance générale v. Sanguinet Express Inc.*, [1989] R.D.J. 93 (C.A.) (hereafter *Sanguinet Express*), motion for leave to appeal to the Supreme Court of Canada dismissed, June 1, 1989.

⁶ [1980] A.C. 521 (hereafter *Waugh*).

notably discussed the admissibility of an inquiry report made by two officers of the Railways Board shortly after an accident. Lord Wilberforce made the following comments on the evidentiary issues involved in the case:

“It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply.”⁷ [emphasis added]

The Court’s reasoning is related to the “anticipation of litigation” privilege, which covers documents and reports that were made specifically with contemplated or existing litigation in mind.

The *Davies v. American Home Assurance Case*

The Ontario Superior Court of Justice seems to have narrowed the breadth of the solicitor-client privilege in the judgment it recently rendered in *Davies v. American Home Assurance Co.*⁸ The case dealt with an insured’s claim against his insurer pursuant to an accidental death and dismemberment policy. The insurer refused to indemnify its insured on the grounds that the personal injury resulted from an intentional act. The insured argued that the insurer had violated its contractual obligations and had acted in

bad faith in its treatment of his claim. Because the insured raised the allegation of bad faith, he sought to obtain a copy of the investigator’s reports and related notes which the insurer had used to take a decision on the coverage.

At first glance, the investigator’s file did not seem to be privileged because his reports had not been prepared in anticipation of litigation. According to the “dominant purpose” test, there was no reason to prohibit the communication of the reports even if they were subsequently transmitted to the insurer’s lawyer, who “controlled” the file.

The Court then examined the question as to whether the legal opinion letters that had been prepared by the insurer’s lawyer to provide guidance on the coverage issues were privileged documents. The Ontario Superior Court of Justice answered the question negatively. It was inevitable that the insured would need to consult the legal opinions in order to support his argument on the insurer’s alleged bad faith. Judge Kiteley made the following remarks on the issue:

“The information available to the insurer upon which it decided whether or not to pay the claim is critical. Client-solicitor privilege cannot be raised to protect communications during the investigation, evaluation, assessment and decision stages. If legal opinions were protected by client-solicitor privilege where “the investigation was controlled by counsel” instead of by the insurer, whose duty it is to act in good faith toward the insured, then that would encourage insurers to delegate such responsibility to counsel.”⁹ [emphasis added]

The Court therefore ordered the production of the investigator’s reports and related notes, as well as the opinion letters written by the insurer’s lawyer before its denial of coverage.

Note that a leave to appeal has been granted to the insurer in this file.¹⁰

⁷ *Ibid.* at 533.

⁸ (2001), 27 C.C.L.I. (3d) 194, additional reasons included at (2001), 27 C.C.L.I. (3d) 207 [hereafter *Davies*].

⁹ *Ibid.* at 206-207.

¹⁰ (2001), 30 C.C.L.I. (3d) 58

Alain Olivier has been a member of the Quebec Bar since 1995 and specializes in Insurance Law



The Possible Follow-Up in Quebec

In a case dealing with the same factual circumstances, would a Quebec Court have rendered the same decision as the Ontario Superior Court did in the *Davies* case? As we have emphasized, the “dominant purpose” rule has been recognized and applied by the Quebec Courts. However, given the text of article 9 of the Quebec *Charter of Human Rights and Freedoms* and its broad protection of professional privilege, it is possible that a Quebec Court would have decided that a legal opinion prepared for an insurer is privileged even if it was not prepared in the anticipation of litigation.

For example, in the case of *Sanguinet Express*,¹¹ that was decided by the Quebec Court of Appeal in 1989, the Court distinguished *Fava* and *City of LaSalle* to hold that the report prepared by a claims adjuster for the insurer, which then transmitted a copy to its lawyer, was privileged. The Court noted that the report could include information on the credibility

and honesty of one or more individuals and would help to guide the lawyer in his recommendations to the insurer regarding coverage.

Nevertheless, following the *Davies* decision, we believe that insurers should be made aware that claims adjusters’ reports and lawyers’ opinion letters that are prepared during the investigation and assessment process (and **before** a decision is taken with respect to coverage) are not necessarily protected by professional privilege.

Alain Olivier

¹¹ *Supra* note 5.

You can contact any of the following members of the General and Damage Insurance group in relation with this bulletin.

At our Montréal Office

Edouard Baudry
Anne Bélanger
Jean Bélanger
Anthime Bergeron
Julie-Anne Brien
Marie-Claude Cantin
Michel Caron
Paul Cartier
Isabelle Casavant
Jean-Pierre Casavant
Louise Cérat
Louis Charette
Julie Cousineau
Daniel Alain Dagenais
François Duprat
Nicolas Gagnon
Sylvain Gagnon
Sébastien Guénette
Jean Hébert
Odette Jobin-Laberge
Bernard Larocque
Jean-François Lepage
Robert Mason
Pamela McGovern
Jacques Nols
J. Vincent O'Donnell

Janet Oh
Alain Olivier
Dina Raphaël
André René
Ian Rose
Jean Saint-Onge
Évelyne Verrier
Dominique Vézina
Richard Wagner

At our Québec City Office

Pierre Cantin
Philippe Cantin
Pierre F. Carter
Frederic Delaunay
Pierre Gourdeau
Claude M. Jarry
Claude Larose
Jean-François Pichette
Marie-Elaine Racine

At our Ottawa Office

Brian Elkin
Patricia Lawson
Alexandra LeBlanc

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

Suite 1810
360, Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site

www.laverydebilly.com

All rights of reproduction reserved. This bulletin provides our clients with general comments on recent legal developments. The texts are not legal opinions. Readers should not act solely on the information contained herein.