ICBC Claims And Litigation Privilege

December 3rd, 2008

Reasons for judgement were released today by the BC Supreme Court ordering the production of certain documents that the defendants claimed were exempt from disclosure due to 'litigation privilege.'

The Plaintiff suffered severe head injuries when struck as a pedestrian in 2006. In the course of her lawsuit her lawyer served the defendants with a Demand for Discovery of Documents. In exchanging their List of Documents the Defendants claimed 'litigation privilege' over some of the documents. The Plaintiff brought motion to compel production of these documents and largely succeeded with the court holding that:

the defendants failed to provide sufficient information to enable the plaintiff to assess whether the defendants were correctly claiming litigation privilege over each of the documents found in P3 to P9 of their list of documents.

In reaching this conclusion Mr. Justice Blair provided a great overview of the legal principles relating to a claim of litigation privilege which I reproduce below:

*[5] Litigation privilege extends to those documents prepared for the dominant purpose of preparing for ongoing or reasonably anticipated litigation as discussed in **Hamalainen (Committee of) v. Sippola,** [1991] B.C.J. No. 3614; 2 W.W.R. 132; 9 B.C.A.C. 254; 62 B.C.L.R. (2d) 254. Wood J.A. (as he then was) for the Court of Appeal stated at ¶18 that the two following factual findings required answering to determine whether litigation privilege applied to a document:*

(a) Was litigation in reasonable prospect at the time the document was produced, and

(b) If so, what was the dominant purpose for the document's production?

[6] Wood J.A. held that the onus is on the party claiming privilege to establish on a balance of probabilities that both tests are met in connection each of the documents for which the party claimed litigation privilege. With respect to the first factual finding, Wood J.A. wrote at ¶20 that

. . . 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.

[7] With respect to the second factual finding Wood J.A. wrote:

21. A more difficult question to resolve is whether the dominant purpose of the author, or the person under whose direction each document was prepared, was "… [to use] it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation …".

*22. When this Court adopted the dominant purpose test, it did so in response to a similar move by the House of Lords in **Waugh v. British Railways Board**, [1980] A.C. 521. In that case the majority opinion is to be found in the speech of Lord Wilberforce, who agreed "in substance" with the dissenting judgment of Lord Denning M.R. in the Court below. While the Court of Appeal judgments do not appear to have been reported, some excerpts from Lord Denning's opinion are to be found in the speech of Lord Edmund-Davies, including the following at p.541 of the report:*

If material comes into being for a dual purpose — one to find out the cause of the accident — the other to furnish information to the solicitor — it should be disclosed, because it is not then 'wholly or mainly' for litigation. On this

basis all the reports and inquiries into accidents — which are made shortly after the accident — should be disclosed on discovery and made available in evidence at the trial.

*23. At the heart of the issue in the **British Railways Board** case was the fact that there was more than one identifiable purpose for the production of the report for which privilege was claimed. The result of the decision was to reject both the substantial purpose test previously adhered to by the English Court of Appeal and the sole purpose test which by then had been adopted by the majority of the Australian High Court in **Grant v. Downs**.*

24. 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.

*[8] The dominant purpose test in the context of litigation privilege came before the Supreme Court of Canada in **Blank v. Canada,** 2006 SCC 39. Fish J. for the majority noted at ¶60 that the dominant purposes standard was consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure.*