Court Does Not Require Defendant Insurer To Produce Its File From A Previous Related Action

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In the recent interlocutory decision, *Hall v. Peel Insurance Co.*, 2016 ONSC 5288, the Ontario Superior Court allowed an enlarged definition of litigation privilege and found that the defendant insurer was not required to produce its complete file nor its law firm's file with respect to a previous related action.

The plaintiff was a homeowner whose house was damaged by a fire. At the time, the plaintiff's home was occupied by a tenant, Mr. Doherty. The plaintiff was insured by Wawanesa and Mr. Doherty was insured through Peel Mutual Insurance Company ("Peel Mutual").

The plaintiff commenced an action against Mr. Doherty (the "first action"). Pursuant to the provisions of the policy, Peel Mutual retained a law firm to represent it. Ultimately, the law firm got off the record due to a lack of cooperation by Mr. Doherty. Mr. Doherty's defence was struck and the plaintiff obtained default judgment against him. Mr. Doherty subsequently filed for bankruptcy and the plaintiff was unable to collect. As a result, the plaintiff started a new action against Peel Mutual pursuant to section 132(1) of the *Insurance Act,* R.S.O. 1990, c. 18 (the "second action").

In the second action, the plaintiff brought a motion for production of the complete independent claims adjuster's file and Peel Mutual 's complete file pertaining to the first action, which Peel Mutual had claimed litigation privilege over. In addition, the plaintiff sought production of the law firm's file relating to the first action, subject to solicitor-client privilege. All documents sought by the plaintiff were listed in Schedule "B" of Peel Mutual's Affidavit of Documents.

As of the motion date, Peel Mutual had already produced the complete independent adjuster's file. The remaining issues to be determined were the production of Peel Mutual's complete file and the production of the law firm's file.

When considering the issue of whether Peel Mutual's complete file and the law firm's file related to the first action should be produced, the Court addressed both solicitor-client privilege and litigation privilege and the duration of each. Specifically, quoting the 2006 Supreme Court decision in *Blank v. Canada (Minister of Justice)*, 2006 S.C.J. 39, the

Court noted that litigation privilege (unlike solicitor-client privilege) is of temporary duration and "expires with the litigation of which it was born" (*Blank*, para. 8).

However, this is not the case when matters are related. As stated by the Supreme Court of Canada in *Blank*:

[34] [Litigation privilege] cannot be said to have been "terminated" in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[39] At a minimum, it seems to me that this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arises from the same or a related cause of action (or "judicial source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

The Court found that the documents being requested from the law firm's file, namely emails from the firm to Peel Mutual, notes by lawyers and internal memos, were all covered by solicitor-client privilege and therefore ought not to be produced.

With respect to Peel Mutual's complete file, the Court found that an enlarged definition of "litigation privilege" was warranted, given that it had been originally prepared in connection with the first action, which had the same or related parties as the second action and issues in common to both actions. As a result, Peel Mutual was not required to produce its complete file with respect to the first action, which included Peel Mutual's claims notes.

This decision is a helpful reminder that litigation privilege does not necessarily end when an action has been concluded, but that it can carry over into subsequent actions with related parties and/or where the same issues are in dispute.

By

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