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INTRODUCTION

We all are aware, in a general way, that documents or communications involving legal counsel are often privileged and not subject to disclosure. In Cross on Evidence (5th Ed. 1979), the three types of communications covered by the "Legal Professional Privilege", are described as:

(a) Communications between the client or his agents and the client's professional legal advisors;

(b) Communications between the client's professional legal advisors and third parties, if made for the purpose of pending or contemplated litigation;

(c) Communications between the client or his agent and third parties, if made for the purpose of obtaining information to be submitted to the client's professional legal advisors for the purpose of obtaining advice upon pending or contemplated litigation.

However, not every document or communication that falls into one of the above classes will automatically be
privileged from disclosure. The Courts have enunciated a dual criteria test for determining whether a particular document or communication may be claimed as privileged. The governing law of privilege in Saskatchewan can be found in the Court of Appeal decision in Laxton Holdings Ltd. v. Lloyds Non-Marine Underwriters (1988), 72 Sask. R. 313, wherein it was stated:

"The law has come to us from Australia via Great Britain. The principle is stated by the Australian High Court in Grant v. Downs (1976), 135 C.L.R. 674, at p. 677; 11 A.L.R. 577:

'Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.'

This test was adopted in Great Britain by the House of Lords in Waugh v. British Railways Board, [1979] 2 All E.R. 1169, at p. 1183, and thereafter in this Province in Saskatchewan Power Corporation v. A.M.C.A. International Limited (1985), 41 Sask. R. 317, and Paul's Hauling v. Baumung, [1986] 5 W.W.R. 115; 49 Sask. R. 213. In the latter case, Maher, J., pointed out that the test had been adopted by the Courts of Appeal of five Canadian Provinces. The test was formulated to reconcile two competing principles, first that all relevant evidence should be made available for the Court and second, that communications between lawyer and client should be allowed to remain confidential and privileged. In reconciling those two principles, the Court determined that the public interest was, on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation."
The privilege of a document held by one of the parties will be maintained if:

1. the dominant purpose of the author or the person authorizing the preparation thereof was to use it or its contents to obtain legal advice or to conduct or in aid of litigation; and

2. the document was prepared at a time when there was a reasonable prospect that litigation would ensue.

The onus is on the person who seeks to claim privilege to establish his right to refuse production of the document to the other side: Landru v. Inter City Contractors Ltd. (1986), 48 Sask. R. 308 (Q.B.). The focus of this paper will be to examine the Courts' application of the above-enunciated test to certain "special documents" which may be generated or obtained in the course of civil litigation.

**Solicitor's Documents and Knowledge**

Most counsel are aware that documentary privilege extends to materials compiled by the lawyer and/or contained in his files, memoranda, and notes pertaining to the instant case. This is what is known as the "lawyer's brief" or
"work-product" rule of privilege. However, it is not always clear how far a lawyer's brief privilege extends over matters simply within the solicitor's knowledge.

An interesting examination of this problem can be found in Signcorp Investments Ltd. v. Cairns Homes Ltd. (1988), 63 Sask. R. 224 (Q.B.). In that case one of the questions to be determined was: does a corporate officer have the right to refuse to answer questions at discovery on the grounds that the information sought, if a material fact, is within the knowledge of the corporation's counsel, and is, therefore, privileged from discovery?

Barclay, J. affirmed that the jurisprudence is well settled that there is a separate privilege for papers and materials created specifically for the lawyer's brief for litigation. However, the Court went on to state that the privilege relates to communications embodied in the solicitor's working papers only. It does not extend to any facts which the solicitor has acquired through sources other than the client or his agent. He relied on Susan Hosiery Ltd. v. M.N.R. (1969), 2 Ex. C.R. 27, at p. 34 where Jackett, J. stated:

"What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or
documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise the party would be bound to give discovery of them."

The Court concluded that relevant facts must be disclosed, even if these facts are contained in a privileged communication or report.

Barclay, J. further held that this principle is equally applicable to material facts obtained by an expert retained by one of the parties to an action. He cited the decision in Best Way Lath and Plastering Co. Ltd. v. McDonald Construction Co. Ltd. (1973), 31 D.L.R. (3d) 47, where the Nova Scotia Court of Appeal held that a defendant must answer questions of fact where those facts were ascertained by the expert even if the facts were in a confidential report provided to the defendant's solicitors or in communications between them. Cooper, J.A., at p. 61 concluded:

"I do not, however, think that the mere retainer of the expert brings down the curtain of privilege on everything done or said by the expert in the course of carrying out what he has been asked to do."

Therefore, the ambit of the lawyer's brief privilege, which at first glance appears to be a potentially broad prohibition to disclosure, has been deftly circumscribed by the Saskatchewan Courts, in order to preserve the rights of an opposing party to full disclosure of the facts surrounding the action in question.
Another "special" type of document for which there may be an attempt to claim privilege are notes or memoranda prepared by the plaintiff or defendant himself, and which are subsequently provided to or utilized by the party's solicitor in preparation of his case. An example, of such a situation can be found in Saskatoon Drug and Stationary Co. Ltd. v. Anderson (1990), 81 Sask. R. 176 (Q.B.). In that case an employee came to believe that his employer was going to dismiss him in the near future. The employee felt he would probably have to resort to litigation and began to prepare memos for that purpose. The memos concerned incidents and events involving his employment. The employee later sued for damages on the ground of constructive dismissal. The employer then applied for discovery of the personal memos which the employee claimed were privileged.

The Saskatchewan Court of Queen's Bench reviewed the two-fold test for privilege and held that the party's notes in this case did not meet either branch. The Court stated that the majority of the memos could not meet the dominant purpose test and that at no time during which all fourteen documents were prepared could it be said that there was a reasonable prospect of litigation, despite the employee's sworn affidavit
to the effect that he had a strong suspicion that he would be forced out of the company and that in order to obtain redress he would have to resort to litigation. Hrabinsky, J. concluded, at p. 178:

"A mere belief that to obtain redress sometime in the future one will have to resort to litigation when in fact no claim has yet been made does not raise a reasonable prospect of litigation. On the material, I find that at the time the documents were prepared there was no reasonable prospect of litigation."

The result in this case is somewhat troubling, as it seems to fly in the face of the dicta laid down in the Laxton case, and subsequently followed in a 1991 Court of Queen's Bench decision, International Minerals and Chemical Corp. v. Commonwealth Insurance Co. (1991), 89 Sask. R. 1 (Q.B.). That case, following what was previously stated in the Grant v. Downs (supra) decision, held that the dominant purpose for which the documents in question were created may be the purpose in either the mind of the author or of the person procuring the document. In this case, the Court had before it sworn affidavit evidence to the effect that the dominant purpose in the mind of the author of the document was future necessary litigation. It would seem that no one is in a better position than the potential plaintiff in an action, who was also the author of the document, to know whether there will be litigation. Is the test of what is a reasonable prospect of litigation subjective or objective? In the
Saskatoon Drug (supra) case, the Court seems to apply an objective determination of both the purpose and prospect of litigation.

Perhaps the determinative element of this case was the thirteen month time span between the date on which the first memo was made, and the date on which the individual commenced his action for constructive dismissal. The Court seemed quite certain that the majority of the documents, which were created well before legal counsel was consulted, could not have been created for the dominant purpose of litigation. In order to claim privilege over such documents in other cases counsel should be mindful that it may be necessary to demonstrate some contemporaneity in time between the creation of the memoranda and the commencement of litigation.

CROWN PRIVILEGE

A unique situation occurs when one of the parties to the action is the Government of Saskatchewan, a governmental agency, a cabinet minister: the Crown. Both the common law and legislation have created special rules with respect to the privilege of documents in the possession of the Crown.
With respect to discovery in cases where the Crown is a party, section 13 of The Proceedings Against the Crown Act, provides:

13 "In proceedings against the Crown the Rules of the Court in which the proceedings are pending as to discovery and inspection of documents, examination for discovery and interrogatories apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a document or to make answer to a question on discovery or interrogatories on the ground that the production thereof or the answer would be injurious to the public interest."

That section was considered by the Court of Queen's Bench in Morgan v. Saskatchewan (Government), Hardy and Binkley (1986), 48 Sask. R. 234 (Q.B.). In that case, Hardy, who was a member of the Executive Council of the Province of Saskatchewan and the Minister responsible for the Saskatchewan Housing Corporation had refused to answer certain questions put to him on discovery on the ground (inter alia) of Crown privilege. With respect to the claim of Crown privilege, Malone, J. followed the decision of Culliton, C.J.S. in Central Canada Potash Company Ltd. v. Attorney General for Saskatchewan (1975), 50 D.L.R. (3d) 560 (Sask. C.A.) wherein he stated at p. 562:

"I think the law is well settled that, in the absence of an effective rule or special legislation, discovery cannot be compelled from the Crown."

Malone, J., at p. 237 concluded:
"I conclude therefore that the claim of Crown privilege, once invoked by a minister of the Crown on discovery, is a sufficient ground in this province to base a refusal to answer a question without further explanation being offered. The legitimacy of the claim of Crown privilege and the determination of prejudice to the public interest cannot, therefore, be resolved at the discovery stage of the proceedings and are matters for determination by the trial judge."

Following on the heels of the Morgan decision was the decision of Armstrong, J. in Northern Pines Enterprises Limited v. Saskatchewan (Government) (1986), 48 Sask. R. 313 (Q.B.). In that case the question to be decided was whether or not the right of the Crown, to object to the production of documents, "the production of which would be injurious to the public interest", pursuant to section 13 of The Proceedings Against the Crown Act, was subject to a review by the Courts. Armstrong, J. found that he was bound by the decision in Morgan, and as such, the Crown's claim of privilege on discovery should be sustained, and that it was not open to challenge at the discovery stage of proceedings.

However, Armstrong, J., in obiter, discussed how he would have decided the case but for the Morgan decision. Armstrong, J. interpreted section 13 of The Proceedings Against the Crown Act as intending to give the Crown nothing more than a ground for claiming privilege not available to others, but subject to review by the Court, as in the case of ordinary claims of privilege. He carried out an extensive

"Courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."

Armstrong, J. concluded his obiter statements by saying at p. 317:

"Put simply, the Saskatchewan Act gives an individual the right to sue the Crown and the same Rules of Court apply as in a suit not involving the Crown, with the exception that there is preserved by section 13 an additional ground of objection to production of documents. That additional ground the Crown has always had. It is not, however, an absolute privilege in all respects but is subject to consideration by the Court as .... it always has been. " The word 'refuse' in section 13 of *The Proceedings Against the Crown Act*, in my view, means no more than 'object', but to say the Crown may 'refuse' seems much more appropriate."

Therefore, it is clear that the interpretation to be given to section 13 of *The Proceedings Against the Crown Act* has not been definitively decided by the Saskatchewan Court of Queen's Bench. Counsel should be aware of this difference in opinion as an opportunity may exist for an argument following
along the lines of the obiter comments of Armstrong, J. in the Northern Pines case, at least until the matter is considered by the Court of Appeal.

The other area in which Crown privilege may be an issue is in a situation where either a private individual or a special interest group demands disclosure from the Crown or a Crown agency of documents within its possession. Such was the case in Saskatchewan Action Foundation for the Environment Inc. (SAFE) v. Saskatchewan (1990), 86 Sask. R. 282 (Q.B.). In this case, SAFE had applied for an order compelling the Minister of the Environment and Public Safety to produce for public inspection information and documentation relating to four projects under development in Saskatchewan. The Minister objected to such disclosure on the grounds of Crown privilege.

To begin with, the Court of Queen's Bench stated that the considerations for openness and disclosure discussed by the Supreme Court of Canada in Attorney General for Nova Scotia v. McIntyre (1982), 132 D.L.R. (3d) 385, which was a case dealing with access by the public to documents developed in the course of a proceeding before a Canadian Court, do not apply to the operations of a governmental department under the control of a minister of the Crown. The Court then found that the question of whether the Minister has an obligation to report to SAFE had two aspects: the first dealt with the
Minister's obligation under the common law, and the second with his obligation under statute, in this case, The Environmental Assessment Act.

As for the common law, the Court stated that to obtain an order for mandamus, which was what was requested, the applicant must show a duty on behalf of the public official and a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced. The Court found that no such duty or entitlement existed in this case under the common law. It stated:

"The common law does not oblige officials or officers of any of the levels of government in this Province to produce for inspection by anyone the public documents held by it."

Therefore, the Court found that production could only be ordered where there is some statutory law legislating otherwise than the common law. In this case, the Court could find no provision in The Environmental Assessment Act which would go so far as to legislate such disclosure.

This decision was appealed to the Saskatchewan Court of Appeal in Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety), [1992] 2 W.W.R. 97 (C.A.), where the majority of the Court held that The Environmental Assessment Act did provide a statutory right for SAFE to obtain
disclosure of all documents and information in the Minister's possession relating to the developments, and as such there was a corresponding duty in the Minister to make such disclosure. However, the Court did recognize that pursuant to section 7 of the Act, which provides the Minister with the power to limit disclosure where, in the opinion of the Minister, it is in the public interest to do so, the discretion to refuse full disclosure still existed. As well, the majority held that the Minister also maintained the ability to claim an exemption of certain documents by reason of solicitor-client privilege.

As the majority found a right and corresponding duty to disclosure within the statute, it declined to consider the appellant's contention that the common law was to the same effect.

In the minority, Wakeling, J.A. did not agree that The Environmental Assessment Act provided a statutory right of disclosure sufficient to support the application in question. In coming to this conclusion, he upheld the reasoning of the Court of Queen's Bench with respect to the common law position on Crown immunity from disclosure. He stated, at p. 128:

"This immunity from disclosure is not a new or startling proposition. It is one of the traditional Crown prerogatives, and while a number of the others are gradually being eroded, the prerogative has remained almost completely intact, except to the extent it is being legislatively reduced or eliminated in some jurisdictions. There is no doubt
in my mind that legislation constitutes the more suitable process for any revision of this long-standing Crown immunity. In any event, it is not timely for the Courts to seek to change this common law concept when legislation dealing with this immunity now exists or is being currently considered in many jurisdictions, including our own."

Consequently, it appears that the Court of Queen's Bench holding to the effect that production of documents requested will only be ordered where there is some statutory law legislating otherwise than the common law, is still the law within in Saskatchewan. However, in light of the recent enactment of The Freedom of Information and Protection of Privacy Act (proclaimed in force effective April 1, 1992), which appears to provide just such a legislative obligation, there are sure to be a wealth of cases with respect to the disclosure of Crown documents, both at the discovery stage and at trial, in the near future.

PUBLIC DOCUMENTS: MOTOR VEHICLE ACCIDENTS

An area of frequent concern to counsel is the disclosure of documents in litigation involving insurance claims. How do you deal with statements given as a result of a motor vehicle accident, copies of which are in the possession of the claim file maintained by Saskatchewan Government Insurance (SGI) who, often times, through one of its staff lawyers, is representing the defendant? This unique
set of circumstances, combined with a series of statutory enactments, has resulted in an interesting situation regarding the privilege of documents obtained by SGI.

The leading case on this matter is *Brill v. Murphy* (1988), 71 Sask. R. 270 (Q.B.). The plaintiff applied for production from the defendant of a statement given by the defendant to an SGI adjuster pursuant to section 70 of The Automobile Accident Insurance Act, (AAIA), which stipulates that the insurer may require any person involved in an accident to furnish additional information and make such supplementary reports of the accident as the insurer may deem necessary to complete its records. Section 71(1) of the AAIA reads:

"71(1) Subject to subsection (2), reports made to the insurer pursuant to section 68, 69 and 70 shall be the property of the Crown and shall not be made public."

There may, however, be disclosure of the report in the limited circumstances referred to in section 71(2) which states:

"71(2) A report referred to in subsection (1) may be made public under the conditions and to the extent that a report made pursuant to clause 83(1)(a) of The Highway Traffic Act may be made public."

The conditions and extent to which an accident report made pursuant to section 83(1)(a) of The Highway Traffic Act (HTA) may be made public are set forth in
section 84 of that Act, the relevant portion of which reads:

"84(3) Notwithstanding subsection (1), the Board may furnish the administrator and persons engaged in road safety research with information contained in any report received by it pursuant to section 83, but, subject to section 9 of The Vehicle Administration Act, no person who receives such information shall make it public in a form that would enable any particulars to be identified as being related to any specific person or business."

The administrator referred to in subsection 84(3) is the administrator of The Vehicle Administration Act.

Section 3 of that Act states:

"3 Saskatchewan Government Insurance, in its capacity as administrator of the Saskatchewan Auto Fund, is the administrator for the purposes of this Act and shall perform the duties and exercise the powers imposed or conferred on it."

The final step in this process is to refer to section 9 of The Vehicle Administration Act which provides:

"9 The administrator shall provide a copy of any report made pursuant to section 83 of The Highway Traffic Act or section 30 of The Snowmobile Act, with respect to a motor vehicle accident, on request and on payment of the prescribed fee, to a person involved in an accident to which a report relates, or to a person authorized by him for the purpose, or a person who had paid or may be liable to pay for injury or damages resulting from the accident."

This was the path taken by Halvorson, J. in the Brill v. Murphy (supra). He concluded at p. 71:

"Clearly, therefore, the information in an insurance report acquired under section 70 (AAIA) may be furnished to the administrator and to persons
engaged in road safety research as permitted by section 71(2) (AAIA) and subsections 83 and 84 (HTA). As well, by virtue of section 9 (VAA), the administrator may provide a copy of the insurance report to a person affected by the accident.

I conclude that the plaintiff may apply under section 9 (VAA) for a copy of the section 70 (AAIA) insurance report."

In coming to this conclusion Halvorson, J. reflected upon criticisms that AAIA insurance reports should not be made the subject of disclosure because that would be contrary to the public interest. His response to that was to indicate that limited disclosure of insurance reports to persons affected by the accident would not seem to be contrary to the public interest. This may be a reason why it was deemed appropriate to permit limited disclosure by way of section 84 (HTA), and section 9 (VAA).

Counsel should be aware, however, that this process of statutory disclosure enunciated by Halvorson, J. only applies to reports obtained pursuant to section 70 of the AAIA. Halvorson, J. at p. 273 makes it clear that:

"If the defendant's report was given pursuant to statutory condition 4(1){a} of section 48 (AAIA) or statutory condition 6 of section 39 (AAIA), different considerations might apply."

Halvorson, J. has thus left open the door for argument concerning disclosure of reports obtained pursuant to the above-mentioned sections.
Following the decision in *Brill v. Murphy* the Saskatchewan Court of Queen's Bench again had an opportunity to rule on the disclosure of documents obtained following a motor vehicle accident, in the decision in *Head v. Moostoos*, [1989] 1 W.W.R. 160. In that case, the statements in issue included:

1. A statement given by the plaintiff to the RCMF;
2. An accident report given to an SGI adjuster by the defendant;
3. A "warned" statement given by the defendant to the RCMP; and
4. A statement a witness gave to the RCMP.

With respect to the first statement, the Court found that under section 11(2) of *The Highway Transportation Act*, the Board may, with the written consent of the person to whom a report relates, furnish the person named in the consent with the information contained in the report. Therefore, defence counsel conceded that probably all that was necessary was the consent of the plaintiff to its release to his counsel, since the statement in question must have related, at least in part, to the plaintiff who gave it. The Court held that no order should be required unless the Board refused to furnish the information. In that case, the Court held that its rulings on
the remaining statements should apply, and thus the statement would have to be produced in any event.

As for the second report, the Court found that it was provided to SGI pursuant to section 70 of the AAIA. As such, Halvorson, J.'s comments in *Brill v. Murphy* applied, and the report was ordered to be produced. As for the final two statements, the Court found that they were transmitted to SGI pursuant to section 83(1) of *The Highway Traffic Act*. Again, the *Brill v. Murphy* process applied and they were required to be produced.

This case is of interest because of Wedge, J.'s holding that even without the release by the administrator of the statement given by the plaintiff to the RCMP, she would rule it non-privileged in any event. She dismissed the defendant's argument that the documents were privileged in that they had as their dominant purpose litigation or anticipated litigation stating at p. 164:

"They were given to a third person, a policeman or an insurance adjuster, for various purposes. Immediately following an accident, the police take statements to determine whether criminal charges should be laid and are required to pass on the information received for the various purposes of the HTA and the AAIA, to be used in highway statistics and research, to ascertain insurance liability and for use in litigation if need be."
As such, the Court concluded the reports were not made for the dominant purpose of anticipated litigation, and therefore, were not privileged. The ramifications of this holding would appear to be that counsel may be afforded a wide scope of discovery concerning police reports and witness statements given to the police, should these reports inevitably end up in the hands of SGI, at least with respect to motor vehicle accidents.

**INSURANCE ADJUSTER'S REPORTS AND INVESTIGATIONS**

The cases under this heading illustrate some definite trends in the Courts' approach to assessing the validity of a claim of privilege over a report of an insurance adjuster or investigator.

In *Bryson v. Saskatchewan Mutual Insurance Company* (1986), 50 Sask. R. 204 (Q.B.) an insured filed a Proof of Loss claim with his insurer pursuant to his insurance policy after his home was broken into and a number of articles were stolen. The insured denied liability for the loss and an action was commenced. The insurer claimed privilege over an adjuster's report and a report from the Insurance Crime Prevention Bureau. The insured applied for an order that the documents be produced.
The insurer's argument was that the decision to reject the applicant's claim was made before either of the reports in question were received by it, and thus neither of the reports were used in coming to this decision. Consequently, it claimed that the reports were in fact requested for the dominant purpose of anticipated litigation, which it felt would occur once it had rejected the applicant's claim. Grotsky, J. in his discussion of 'the dominant purpose test, which he held should apply, cited the decision of Chief Justice McEachern of the British Columbia Supreme Court in Somerville Belkin Industries Limited v. Brocklesby Transport, Kingsway Freightlines Limited and Witty, [1985] 6 W.W.R. 85, wherein he stated at p. 88:

"In my view it is permissible to state that adjuster's reports and other documents prepared by them as a result of their efforts or inquiries are privileged. I say this because litigation is always a reasonable prospect whenever there is a casualty, whether such litigation be between the insured and his insurer regarding indemnity, or between the third parties and the insured, and the documents are created with litigation very much in mind. That is one of the predominant reasons for their creation."

Although not overtly adopting Chief Justice McEachern's views, Grotsky, J. concluded at p. 210:

"On the facts before me on this application, I am satisfied that from the very beginning the defendant's adjuster was suspicious of the plaintiff's claim. It reported its suspicions to the defendant. The adjuster's suspicions grew. Based on the suspicions and recommendations of its adjuster the defendant determined that the claim should be rejected, and did. It then authorized the
subject reports to be requisitioned and prepared. As it had already determined to reject the claim, the reports requisitioned were obviously prepared for the defendant for a purpose other than the rejection of the claim.

Applying the principles enunciated in Waugh, to the facts of this case, I am of the view that the dominant purpose for the preparation of the reports of which the plaintiff now seeks disclosure and production was in anticipation of litigation. Accordingly, I find that the reports are privileged."

The next relevant case in this area is SGI v. Herman (1987), 63 Sask. R. 157 (Q.B.). In this case SGI, which insured property owned by the defendants, had replaced a diamond ring lost by the defendants. Subsequently SGI brought an action against the defendants for recovery of the money alleging the ring was replaced on the basis of fraudulent misrepresentation by the defendants. The defendants applied for an order that reports prepared by investigators of SGI be disclosed at discovery.

The Court found, upon examining the reports, that they were prepared for the purpose of enlisting an opinion from a senior solicitor in the legal department of SGI as to the feasibility of an action to recover the amount paid by SGI to the defendants to replace the diamond. As such, the Court held that the reports met both of the requirements of a claim of privilege: they were prepared for the dominant purpose of giving and receiving professional advice in relation to anticipated litigation. However, the defendants further
submitted that the claim of privilege over these documents had been waived by SGI in that all three of the authors of the reports had testified at the defendant's criminal trial, and, according to the defendants, the contents of the reports were, therefore, in effect, disclosed through their testimony.

In support of this submission the defendants relied upon the Ontario decision, Frind v. Sheppard, [1940] O.W.N. 135 (H.C.J.), which was a case where correspondence between one of the litigants and her solicitor was claimed to be privileged from disclosure. However, the correspondence had been read into the record of a prior proceeding. The Court held that once the contents of the privileged communication had been made public, there was no reason to any longer ensure confidentiality.

Unfortunately for the defendant in SGI v. Herman, the Saskatchewan Court of Queen's Bench found that there was no suggestion that the three reports had become evidence, or that the contents of the reports were read into the record of the criminal trial or any other proceeding. The authors themselves merely testified, and, somewhat similar to the reasoning applied with respect to Signcorp (supra), the documents themselves were still privileged. The Court concluded that in the absence of any waiver, or any evidence
that the contents of the reports had been made public, SGI was entitled to maintain its claim of privilege.

*Laxton Holdings Ltd. v. Lloyds Non-Marine Underwriters,* (supra) is the leading case in Saskatchewan in support of the two-fold dominant purpose test of privilege. However, it is of interest to note that this was a case where the document claimed to be privileged was an investigator's report prepared pursuant to an insurance claim. The plaintiff filed a Proof of Loss with the defendants. The insurer's broker had grave suspicions regarding the claim of the insured that the insured's property had been stolen. The broker consulted Lloyd's lawyer, who suggested the hiring of a private investigator. The private investigator was retained by the broker to investigate the claim but the private investigator was instructed to report to Lloyd's lawyer. The plaintiff subsequently applied for production of the documents and records of the investigation.

The Court was provided with "unequivocal" depositions from the defendants to the effect that the investigation was carried out for the purpose of collecting information which could be used to defend the claim in the Court, and that at the time, the deponent knew that the claim was definitely headed for the Courts. The Court found:
1. That the report was ordered for the purpose only to use it or its contents in order to obtain legal advice to aid in the conduct of litigation;

2. That the broker was almost certain litigation would ensue, or as he termed it "because the claim was definitely headed for the Courts"; and

3. The report was obtained through a lawyer to ensure privilege.

In these circumstances the Court of Appeal held that the report met both branches of the Waugh test, and as such should be privileged.

The last in this line of cases is the Queen's Bench decision in International Minerals and Chemical Corp. v. Commonwealth Insurance Co. (supra). Upon the flooding of the plaintiff's potash mine the defendant insurers retained the services of an insurance adjuster to investigate the loss. Shortly thereafter the defendants retained legal counsel as it was determined that litigation was almost certain. Consequently, the adjuster was instructed to report to and take instructions from counsel in the continuation of his
investigation. Moreover, he was to prepare and provide to
counsel written reports of his investigation. The adjuster
was also enlisted by counsel to collect information from the
defendants on his behalf. All in all, seventeen reports were
generated by the adjuster. Three of these fell into the hands
of the plaintiffs and they subsequently demanded production of
the remainder.

At the outset, Halvorson, J. dealt with the fact
that the adjuster was the "go-between" for counsel and the
defendants. He held at p. 4:

"The simple expediency of channelling all
communication through legal counsel does not of
itself shield the communications from disclosure."

The Court then embarked on the determination of what
the dominant purpose was when the reports were drafted. In
doing so, Halvorson, J. appears to have "refined" the dominant
purpose principle. Firstly, he held that the purpose may be
in the mind either of the author or of the person procuring
the document. Secondly, he held that it is the purpose for
which the report was prepared and not the purpose of the
investigation which governs. Thirdly, the privilege will be
rigidly confined to narrow limits to preserve the public
interest in full disclosure of all relevant evidence. In
commenting on the reasonable anticipation of litigation test,
he emphasized that the contemplated litigation need not
involve the same issues which ultimately form the basis for the eventual lawsuit.

In this instance, the adjuster himself had sworn an affidavit to the effect that in his mind, the primary purpose of the reports he prepared was to obtain legal advice. As well, one of the defendants' claim managers filed an affidavit stating that based on his experience he was of the opinion that as of the date of the first report, litigation was almost a certainty. There was also evidence that when the other defendant insurers received the adjuster's first report they too formed the view that litigation would probably be necessary.

These considerations, coupled with the fact that upon a review of the reports, particularly the earlier ones, the Court sensed that the "tenor" of the reports suggested they were litigation oriented, resulted in the Court concluding that the dominant purpose for the adjuster preparing the reports was to obtain legal advice.

The Court also found that the reports passed the second hurdle of "litigation in reasonable prospect". The Court found that the complexity of the issues involved was apparent immediately, and that there were "millions of dollars at stake". The Court had no difficulty concluding that
litigation was inevitable even from the time of the initial report.

Despite the apparent trend by the Courts to uphold claims of privilege of insurance adjusters' and investigators' reports, there have been some decisions where the Court has ordered disclosure of such documents. In *Sydor's Hardware Co. v. Saskatchewan Power Corporation and Zoorkan* (1989), 73 Sask. R. 150 (Q.B.) the plaintiff's insurer had an insurance adjuster investigate a fire at the plaintiff's building and produce a report. The report had a wide scope including the cause of the fire, the evidence, the amount of the loss and the possible rights of subrogation. The plaintiff refused to produce the report arguing that the dominant purpose for the creation of the document was to obtain legal advice for pending litigation.

In this case, although there was affidavit evidence from the President of the adjusting corporation that he had concluded that his file should be submitted for a legal opinion on the insurer's prospects for successful subrogation, the evidence deposed to in his affidavit did not disclose that such legal counsel intervention was the purpose behind his preparation of the report, and in fact he had sworn to the fact that there were numerous purposes to the preparation of
his report. Matheson, J., in ordering the report produced, stated at p. 153:

"It is quite clear that the dominant purpose of the investigation by the adjuster was to provide information to the insurer as to all possible aspects of the fire loss which might concern the insurer. A competent adjuster would direct his attention to the cause of the fire and explore any possibility of arson or liability by a third party. But that is the type of initial investigation required of any adjuster in the circumstances.

The dominant purpose of the adjuster's report was to provide information to the insurer in response to the general investigative instructions which had been received. The matter of subrogation was but one aspect of the response. Consequently, the report is not privileged."

Finally, in Cousins v. Walsh [1992] 5 W.W.R. 277 (Sask. Q.B.) a fire damaged the plaintiff's house. The investigator submitted a fire investigation analysis report to the insurer. The plaintiffs' claim under their insurance was finalized a year after the fire. A year after that, the insurer brought a subrogated action against the defendant in the plaintiffs' names. The defendant applied for an order requiring the plaintiff to produce the investigator's report for inspection. The plaintiffs claimed privilege.

With respect to the determination of privilege in general, Noble, J. made the following comments at p. 280:

"In general terms it appears to me that whenever it was clear that litigation would arise from an incident or where it could reasonably be anticipated that it would result, then any document prepared for
the dominant purpose of dealing with that litigation is usually considered privileged. ... On the other hand, where it is not clear whether litigation will ensue or might reasonably be anticipated at the time the document is prepared, then more often than not the Courts have held that it is not privileged. This also appears to be the case in those instances where the document is prepared for more than one purpose - for example, where an investigator is asked to first determine the cause of a fire without which the insurer cannot make a decision as to whether or not litigation is a reasonable possibility [the case here]. So a document made for more than one purpose will tend to weaken the ability of the party who commissioned its creation from establishing that the "dominant purpose" was to use it to obtain legal advice or to conduct or to aid in the conduct of litigation."

The Court found that here, the plaintiffs seemed to be claiming a dual purpose for the investigation: both to investigate the cause of the fire, and to see whether monies paid to the plaintiff could be recovered by way of subrogation. One would have followed the other, because unless the insurer could determine the cause of the fire, no decision as to the possible litigation could take place. The Court also suspected that the insurer was more interested in the cause of the fire than the use to be made of the report, because of the length of time it took to settle the plaintiffs' claim and then to commence the action. Thus the dominant purpose test was not satisfied.

As well the Court was not satisfied that at the time the report was prepared there was a reasonable prospect of litigation. The Court found that there was no explanation by
the plaintiffs' insurer as to why, immediately after the fire, it had any reason to suspect foul play or negligence by anyone. As such, the Court was unable to conclude that the only purpose of the report came into existence was to prepare for expected litigation, particularly when this claim was not made until some years after the fire actually took place.

Noble, J. in the course of his decision referred to the British Columbia decision in Somerville Belkin Industries Ltd., (supra) wherein, the view was expressed that in insurance litigation all adjusters' reports and other inquiries made by an insured are privileged because litigation is always a reasonable prospect in such claims. With reference to that case, Noble J. stated at p. 280:

"I am unable to find where this opinion has been adopted in Saskatchewan and I also decline to do so."

This is an intriguing statement, considering that in Bryson the Somerville decision was cited with favour, and Bryson was referred to and considered by Noble, J. in his decision.
CONCLUSIONS/GUIDELINES/QUESTIONS

Set out below are some conclusions that can be drawn from this analysis of the recent case law in Saskatchewan with respect to privilege of "special documents":

1. The Courts generally give significant weight to affidavit evidence from the individual who authored the document in question with respect to the purpose for the preparation of the document and the likelihood of litigation.

2. In all cases except Saskatoon Drug, the dominant purpose for the preparation of the document in question seems to be found by the Court in the perceived purpose of the author of the document. Therefore, coupling this with the above, in cases where the author of the document provides a sworn affidavit to the effect that the dominant purpose of his creating the document in question was to aid in the preparation of anticipated litigation, the Courts have repeatedly held that the document is privileged.

3. Despite Halvorson, J.'s statement in the IMC case, that "the simple expediency of channelling all communications
through legal counsel does not of itself shield the communications from disclosure", the cases generally demonstrate that if the investigator or adjuster is hired by the defendant but reports to counsel, it is likely that the reports in question will be held to be privileged.

4. Generally, if the defendant is an insurance company and the document over which privilege is claimed is a report prepared by an adjuster of the defendant insurance company, such a report will be held to be privileged. There are exceptions.

5. The Courts tend to uphold a claim of privilege over a document where there is contemporaneity between the time when the document in question was prepared and the onset of litigation. It is much easier to convince a Court that a document was prepared with the reasonable anticipation of litigation as its dominant purpose when the onset of that litigation occurs contemporaneously with the commencement of the action or shortly thereafter.

6. Judges will exercise their discretion to review the document in question where privilege is in dispute, and they are influenced by its content, tenor and even its title in determining whether or not it was prepared for the dominant purpose of anticipated litigation.
The cases which have been examined here also pose some interesting questions which counsel should consider when faced with a dispute over the privilege of a document. Firstly, consider whether the remarks in *Signcorp* with respect to experts should be or are applicable to reports drafted by insurance adjusters and private investigators. Are these individuals experts? Might a party who has been denied disclosure of an adjuster's or investigator's report be entitled to call that individual, either at discovery or at trial, in order to question them regarding the factual matters which were observed by them and included in their reports? How far could this questioning go?

Secondly, query whether Halvorson, J.'s remarks in *Brill v. Murphy* concerning the balance of interests at stake and his conclusion toward limited disclosure, should be applied to insurance adjuster's reports and files in general? Should his remarks be constrained to the statute-governed area of motor vehicle accidents? If limited disclosure of insurance reports and files to persons affected by a motor vehicle accident would not seem to be contrary to the public interest, should not limited disclosure of insurance reports to persons involved in other claim situations be similarly acceptable to the public interest? Is the public interest really being served by maintaining a privilege over insurance adjuster's and investigator's reports in general?
Finally, recall the words of the Saskatchewan Court of Appeal in *Laxton Holdings Ltd.*:

"all relevant evidence should be made available for the Court and ... communications between lawyer and client should be allowed to remain confidential and privileged. When reconciling those two principles, the Court determined that the public interest was on balance, best served by rigidly confining within narrow limits the privilege of lawfully withholding material or evidence relevant to litigation."

With respect to the cases discussed herein, have the Courts adequately reconciled the two above-mentioned competing principles, and have they rigidly confined privilege over the documents in question within narrow limits?

In the past few years there has been a judicial trend across Canada towards broader disclosure of documents and communications in the realm of civil litigation. Are the Saskatchewan Courts following that trend? Many of the special documents discussed herein are extremely relevant and may be necessary pieces of evidence for a proper and just determination by the Courts. However, with the law as it stands at present in Saskatchewan, many of these "special documents" will never be considered by a Court.

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