

Leading by Example: Alberta First to Extend Privilege to Self-evaluative Audits

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The extension of privilege to self-evaluative audits has been slow to emerge in Canada. Led by recent developments in the United States, however, the landscape in Canada is changing and Alberta is leading the charge.

Since as early as 1971, U.S. courts have recognized circumstances where the public interest is not served by disclosure, but rather by keeping corporate self-analysis confidential.¹ The scope of such protection has included, inter alia, product safety assessments, railway accident investigations and academic peer reviews.

In Canada, courts and legislators alike have been more reluctant to extend the “cloak of privilege” beyond the traditional common law categories, i.e. solicitor-client communications or without prejudice communications.

While such decisions as *Slavutych v. Baker*² have recognized non-traditional classes of confidential communications, there is limited judicial acceptance of self-evaluation privilege.

In the context of the insurance industry, corporate self-analysis is vital. Federal and provincial regulators mandated with market conduct regulation are starting to encourage insurers to “undertake self-assessments as a

way to support adoption and implementation of best corporate governance practices and to reduce the risk of non-compliance [with regulatory requirements]”.³ Understandably, insurance companies are concerned that “a robust and effective self-assessment system may provide a roadmap for plaintiffs and other parties wishing to attack the company”. In the United States, six states have addressed such concerns through the introduction of statutory privilege.⁴

Beginning in 2005, a working group of the Canadian Council of Insurance Regulators (CCIR) considered this very issue and recommended that privilege be extended to self-assessments. Alberta is the first province to act on the CCIR recommendation and to legislate special privilege over self-evaluations in the context of civil or administrative proceedings. In November 2008, the Alberta Legislature amended the *Insurance Act*⁵ and added the following section pertaining to self-evaluative audits:

816.2(1) In this section,
(a) “insurance compliance self-evaluative audit” means an evaluation, review, assessment, audit, inspection or investigation conducted by or on behalf of a licensed insurer or

1 See *Banks v. Lockheed-Georgia Corp.*, 53 F.R.D. 283 (N.D. Ga 1971).

2 [1976] 1 S.C.R. 254.

3 *Final Report on Privilege Model and Whistle Blower Protection*, Canadian Council of Insurance Regulators (CCIR) Confidentiality of Information (“Privilege”) Working Group, May 2008.

4 These states include Illinois, Kansas, Michigan, New Jersey, North Dakota and Oregon.

5 R.S.A. 2000, c. 1-3.

fraternal society, either voluntarily or at the request of the Minister or the Superintendent, for the purpose of identifying or preventing non-compliance with, or promoting compliance with or adherence to, statutes, regulations, guidelines or industry, company or professional standards;

(b) “insurance compliance self-evaluative audit document” means a document with recommendations or evaluative or analytical information prepared by or on behalf of a licensed insurer or fraternal society or the Minister or the Superintendent directly as a result of or in connection with an insurance compliance self-evaluative audit and includes any response to the findings of an insurance compliance self-evaluative audit, but does not include documents kept or prepared in the ordinary course of business of a licensed insurer or fraternal society.

(2) Subject to subsection (6), an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any civil or administrative proceeding.

(3) Subject to subsection (6), no person or entity may be required to give or produce evidence relating to an insurance compliance self-evaluative audit or any insurance compliance self-evaluative audit document in any civil or administrative proceeding.

(4) Disclosure of an insurance compliance self-evaluative audit document to a person

reasonably requiring access to it, including to a person acting on behalf of a licensed insurer or fraternal society with respect to the insurance compliance self-evaluative audit, to the external auditor of the licensed insurer or fraternal society, to the board of directors of the licensed insurer or fraternal society or a committee of the licensed insurer or fraternal society or to the Minister or the Superintendent, whether voluntarily or pursuant to law, does not constitute a waiver of the privilege with respect to any other person.

(5) A licensed insurer or fraternal society that prepares or causes to be prepared an insurance compliance self-evaluative audit document may expressly waive privilege in respect of all or part of the insurance compliance self-evaluative audit document.

(6) The privileges set out in subsections (2) and (3) do not apply

(a) to a proceeding commenced against a licensed insurer or fraternal society by the Minister or the Superintendent or the Superintendent in which an insurance compliance self-evaluative audit document has been disclosed,

(b) if the privilege is asserted for fraudulent purposes,

(c) in a proceeding in which a person who was involved in conducting an insurance compliance self-evaluative audit is a party seeking admission of the insurance compliance self-evaluative audit document in

a dispute related to the person's participation in conducting the insurance compliance self-evaluative audit, or

(d) to information referred to in an compliance self-evaluative audit document that was not prepared as a result of or in connection with an insurance compliance self-evaluative audit.

While critics of these legislative changes are quick to challenge the scheme's inherent secrecy and its potential effect on consumer litigants, the CCIR is emphatic that self-evaluation privilege is necessary to enhance consumer protection. The new provisions are not intended to change the status quo of information available to litigants or unfairly disadvantage any party involved in insurance litigation, particularly plaintiffs. Under the present legislative framework, facts about events and circumstances upon which self-assessments are made are not intended to be protected, and will continue to be available through the course of discovery. Moreover, Alberta courts will continue to have discretion to assess claims of privilege when information may be directly relevant to a particular case.

Alberta's legislative amendments strike a delicate balance between competing interests and will inevitably be adopted by other Canadian jurisdictions.

For more information, please contact Oliver C. Hanson (ohanson@parlee.com) or any member of our Insurance Litigation Group.

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.