THE CANADIAN BAR ASSOCIATION
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February 28, 2006

Mrs. Carol Shevlin
Policy Manager (A)
CCIR Secretariat
5160 Yonge Street, Box 85
17th Floor
Toronto, Ontario M2N 6L9

Dear Madam:

Re: CCIR Discussion Paper
— Privilege and Whistle-Blower Protection

The Civil Litigation Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the Canadian Council of Insurance Regulators' (CCIR) December 2005 discussion paper entitled, *Privilege and Whistle-Blower Protection* (the Discussion Paper). The Discussion Paper contains a proposal to extend privilege to self-assessment reports prepared by insurers. Self-assessment, as a regulatory tool, is a fairly recent development in the United States and Canada. Its purpose is to create an environment where problems are identified and brought to the attention of regulators in a timely fashion. Under this new risk-based regulatory approach, insurers are required to self-evaluate and prepare reports for the regulator. Previously, the regulator would conduct the work and prepare its own analysis. Thus, self-assessment reports have been in existence only for a few years.

Some jurisdictions in the United States have recently enacted legislation extending a special privilege to such reports. Below is the CBA Section's response to CCIR's proposed amendment to provincial statutes that would incorporate privilege for self-assessment reports into Canadian law. The Insurance Section of the Canadian Bar Association has had an opportunity to review our response and concurs with its content.

Nature of Privilege

The legal concept of privilege relates to circumstances where a party is not obliged to produce relevant and material evidence to a court or an opposing party because there is an overriding social objective that would be damaged. Because, by definition, privilege deprives a court of law of relevant and material information, the expansion of privilege to documents and communications outside the scope of traditional privilege categories

should be constrained. The Supreme Court of Canada has made it clear that new classes of privilege should be created only where the other social interests in favour of non-disclosure are compelling.[1]

At common law, the creation or maintenance of privilege is governed by the Wigmore Criteria:

(1) The communications must originate in a confidence that they will not be disclosed;

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered;

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[2]

Privilege for Self-Assessment Reports

Although it is not completely clear from the Discussion Paper, it appears that CCIR believes that some form of privilege for self-reports in civil and administrative matters is necessary to ensure full and timely self-reporting. Further, it suggests that the public interest is enhanced by the privilege, as it will ensure that regulators are able to quickly identify, control and eliminate practices that are deleterious to consumers and the marketplace.

Clearly, a relationship between insurance regulators and the insurance industry conducive to complete and timely self-reports is in the public interest. We understand that CCIR would like regulators and companies to develop closer working relationships. However, the Discussion Paper does not make a clear case that the absence of privilege has hampered insurance regulators in the past. The paper does not cite any empirical studies or data to support this conclusion, other than a reference to Canadian insurers confirming that their self-assessments are affected by considerations of litigation.

In addition, CCIR has not made clear how the public interest may be enhanced by the introduction of this special privilege. Information that would be subject to the proposed privilege may be used for public interest prosecutions by the regulators, released to the public by the regulators, or used in penal/criminal prosecutions. Thus, there is no reasonable expectation of confidentiality. The proposed privilege appears to be limited, in large part, to civil proceedings, most likely brought by consumers against insurance companies. The historical view is that insurance companies are in a better position to protect their interests than insured persons. Indeed, insurers must discharge a duty of good faith and fair dealing with their customers, and disclose with reasonable promptness all documents relating to the claim. It is incongruous for insurance companies to have a special protection or right of secrecy from their customers that unduly deprives them of their rights in litigation. Accordingly, based upon the current CCIR proposal, we doubt whether confidentiality is necessary or required.

Additionally, the Discussion Paper is unclear as to the scope of proposed privilege, and in particular, whether it includes internal documents. The proposal does not limit the scope of the privilege to the new self-assessment documents prepared at the behest of the regulator, but rather, it "would apply to documents generated as a result of an evaluation, assessment, audit, inspection or investigation conducted by an insurance company either voluntarily or at the request of a regulatory authority for the purpose of identifying or preventing non-compliance with, or promoting compliance with, statutes, regulations or regulatory guidelines." The expansive form of privilege contained in the proposed wording could exclude from scrutiny by the public any documents reflecting self-criticism by an insurer, which could always argue that the audit or other vehicle of self-assessment was instituted in response to regulatory pressures. In contrast, U.S. state legislation imposes limits

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1 *A(L.L.) v. B(A)* [1995] 4 S.C.R. 536 at paragraph 66 *et seq.*

2 *Slavutych v. Baker* [1976] 1 SCR 254.

on the privilege, and imposes rigorous standards on insurers to establish that documents fall within the limited class of privilege. Such documents may be critical to issues of bad faith or other improper conduct. The public should not be denied access to such vital documentation that speaks to the manner in which the particular company and its representatives are carrying on business.

If privilege is to be granted, it must be on a very clearly defined and limited group of materials. Questions of who may waive the privilege and the survival of the privilege following regulatory prosecutions, for example, must be expressly addressed. This kind of detail is currently lacking in the proposal and limits our ability to comment further on these points.

Whistleblower Protection

The CBA Section is concerned that the proposal does not appear to provide any protection for whistle-blowers that does not already exist at law. It merely provides protection from liability to pay damages arising out of a civil action. There is already comprehensive protection for such persons who make such disclosures honestly and in good faith under the common law. For example, those who report wrongdoing to professional regulatory bodies are entitled to absolute protection from liability for defamation.[3] Rather than providing new protection for whistle-blowers, the effect of the proposal would be to extend the privilege beyond information reported to regulators in the usual way or in self-assessments and to cast a net much further. Potentially, it could catch any information detrimental to an insurer so long as it is passed from whistle-blower to regulator. We are of the view that such vital information should not be withheld from the public by characterizing it as privileged.

Furthermore, preventing an insurer in a regulatory prosecution from having all relevant documents in the case as a result of "whistleblower privilege" gives rise to issues of natural justice and the entitlement of an "accused" to make full answer and defence. At the very least, there must a mechanism to lift any privilege if the interests of the accused in making full answer and defence outweigh the privacy interests of the whistleblower in the particular circumstances of the case.[4] Ordinarily, this means full disclosure of all relevant information after the investigatory phase of a regulatory proceeding is complete, and the prosecutorial phase is under way.

Conclusion

The CBA Section's position is that the case for this special privilege, and how it will benefit consumers and regulators, has not been articulated. Even accepting the case being made out, the proposal contained in the Discussion Paper is too vague and general. It lacks detail about how the legislation would balance the rights of all affected stakeholders and does not address the concerns outlined above. In its current form, the proposal would not be justified according to the legal requirements for creating privilege. If the CCIR wishes to provide us with further proposals or draft legislation, the CBA Section would be pleased to comment.

Again, thank you for the opportunity to consult with the CCIR on this important issue.

Sincerely,

(Original signed by Kerri Froc on behalf of Rodney L. Hayley)

Rodney L. Hayley
Chair, National Civil Litigation Section

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3 See, for example, the discussion of "absolute privilege" in *Duke v. Puts* [1997] S.J. No. 366 (Q.B.).

4 See *Deloitte & Touche LLP v. Ontario Securities Commission* 2003 SCC 61, and *Smolensky v. British Columbia Securities Commission* 2004 BCCA 81.