



THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

**The Voice of  
the Legal Profession**

**La voix de la  
profession juridique**

## **CCIR Proposal Privilege and Whistle-Blower Protection**

**NATIONAL INSURANCE LAW AND THE NATIONAL CIVIL LITIGATION SECTIONS  
CANADIAN BAR ASSOCIATION**

**March 2007**

865 Carling Avenue, Suite 500, Ottawa, Ontario K1S 5S8  
Tel/Tél: 613 237-2925 Toll free/Sans frais: 1 800 267-8860 Fax/Télécop: 613 237-0185  
Home Page/Page d'accueil: <http://cba.org/abc> E-mail/Courriel: [info@cba.org](mailto:info@cba.org)



# TABLE OF CONTENTS

## CCIR Proposal Privilege and Whistle-Blower Protection

<b>PREFACE</b> .....	<b>i</b>
<b>I. INTRODUCTION</b> .....	<b>1</b>
A. Support for Self-Evaluative Assessments Generally .....	1
B. Outstanding Concerns Regarding Extension of Privilege.....	2
C. Recommendations for Improvements to the Draft Proposal.....	2
D. Whistle-Blowing .....	4
<b>II. CONCLUSION</b> .....	<b>5</b>



## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Insurance Law and the National Civil Litigation Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Insurance Law and the National Civil Litigation Sections of the Canadian Bar Association.



# **CCIR Proposal Privilege and Whistle-Blower Protection**

## **I. INTRODUCTION**

The National Insurance Law Section and the National Civil Litigation Section of the Canadian Bar Association (CBA Sections), are pleased to respond to the letter of Grant Swanson to Rodney Hayley dated January 31, 2007. The letter contains the response of the CCIR Working Group on Privilege to comments made by stakeholders on its discussion paper entitled *Privilege and Whistle-Blower Protection* (the Discussion Paper), and a revised draft proposal regarding privilege for “Insurance Compliance Self-Evaluative Audits” and associated documents.

Our comments should be considered supplementary to those made by the National Civil Litigation Section in its letter to the Working Group dated February 28, 2006.

### **A. Support for Self-Evaluative Audits Generally**

The CBA Sections commend the CCIR’s exploration of risk-based assessment as a compliment to insurance regulator’s existing powers and tools.

In particular, the CBA Sections commend the CCIR for explicitly recognizing that “for good corporate governance to reduce the risk of non-compliance, insurers must establish policies and procedures that support compliance and best practices”. We agree insurers have a duty to create, maintain and enforce a culture of good corporate governance and compliance, and that self-assessment audits are an essential element of insurers meeting their regulatory and common-law compliance obligations. If an insurer does not comply with regulatory, common-law or company-set standards or do not achieve expected results, it must identify and make appropriate changes or be responsible to regulators and consumers for failing to do so.

## **B. Outstanding Concerns Regarding Extension of Privilege**

We reiterate our concern about the Discussion Paper not making a clear case that extending privilege to self-assessment documents is required in the public interest. We note the importance of privilege both within the common law and within regulatory regimes, and its sparing use where the public interest requires it. The Discussion Paper suggested privilege is necessary to enhance insurance regulation and encourage full and timely self-reporting. However, it made only a general reference to Canadian insurers confirming their self-assessments are affected by considerations of litigation without any empirical evidence or studies cited. The most recent letter of the CCIR Working Group did not provide any further information about what the CCIR may be relying upon to make its case in this regard. Consequently, our original comments are still pertinent.

During our review of the revised proposal, some members note an omission from the draft relating to self-evaluative audits by General Agencies, Brokers, Personal Agencies and/or agents (“Insurance Intermediaries”). Given the regulatory and common-law duties of Insurance Intermediaries to establish policies and procedures supporting compliance and best practices, presumably the same public interest rationale for extending privilege to insurer self-evaluative audits would apply to Insurance Intermediaries. We are not necessarily advocating their inclusion given our comments above, and we understand that it may be too late for the Working Group to consider the circumstances of Insurance Intermediaries at this point in the process. However, we ask that it consider the need for consistency in its further work on this issue. Below, when referring to insurers, our comments also refer to Insurance Intermediaries.

## **C. Recommendations for Improvements to the Draft Proposal**

Assuming a legitimate case for the extension of privilege to Self-Evaluative Audits can be made, it should have built-in safeguards to protect it from being used to gain unfair advantage in litigation. There is a foreseeable risk of this privilege being used to delay production or avoid production of relevant documents during the course of litigation. This risk is particularly high with respect to evidence supporting bad faith claims against insurers. This is a real and substantial risk to the consumer and to the public interest.



Thus, the privilege must be strictly limited to the minimum necessary to achieve the public interest objective of encouraging insurers to do what is already required of them, namely, to establish policies and procedures that support compliance and best practices.

There is an opportunity to decrease the risk of abuse by clearly delineating the scope of the privilege and including procedural safeguards. In particular, the CBA Sections recommend:

**RECOMMENDATION:**

- **The definition of “Insurance Compliance Self-Evaluative Audit” should be amended to include only audits reasonably necessary for and directly connected to ensuring compliance with regulatory and common-law duties of insurers and to establish, maintain and follow policies and procedures that support compliance and best practices;**
- **The definition of “Insurance Self-Evaluative Audit Document” should be limited to those documents created in the process of the Self-Evaluative Audit. It should list the type and scope of the documents contemplated by the definition. If the regulation provides for the extension of privilege to documents analogous to those listed, privilege should not be automatic. Rather, it should be established by application to the relevant court or tribunal, which would consider the purpose of the protection and the nature of the document in question;**
- **Disclosure by an insurer should waive privilege except where the disclosure is limited to those reasonably requiring access to the results of the Self-Evaluative Audit. Examples might include: CEO’s, chairpersons, board members, auditors, the Appointed Actuary (and those conducting actuarial peer reviews), senior compliance staff, and very senior managers;**

- **If privilege is waived, the effect of the waiver should not depart from the legal norm for voluntary waiver; that is, it must be a complete waiver; and**
- **Any presumptive privilege would be reviewable by a Court, administrative tribunal or arbitrator where allegations of bad faith are raised relating to the failure to conduct Self-Evaluative Audits or take appropriate action to remedy issues identified in Self-Evaluative Audits.**

The CBA Sections would be happy to work with the CCIR to develop draft wording for the privilege model taking into account the foregoing suggestions.

#### **D. Whistle-Blowing**

The CBA Sections reiterate the whistle-blower proposal in the Discussion Paper does not appear to provide any protection for whistle-blowers not already existing in law. We appreciate the Working Group’s clarification respecting the privilege for “whistle-blower documents,” that the intent is to protect information in the possession of the regulator and to leave the insurer in the same position as if the information had not been provided to the regulator. However, the “commonly found” wording of the privilege cited by the Working Group is unequivocal. Any documents provided to the regulator regarding an insurance licensee or applicant are “absolutely privileged.” Again, we reiterate it could potentially catch any information detrimental to an insurer, so long as it is passed from whistle-blower to regulator. In litigation, the insurer would not be obligated to produce the document as it would no longer be within its possession, power or control, and any application for third party production against the regulator could be countered by a claim the document is “absolutely privileged.” The insurer is thus not in the same position “as if the information had not been provided to the regulator,” but potentially in a better position.

Furthermore, as we noted in the previous submission, the proposal appears to undermine the insurer's right to natural justice and make full answer and defence to regulatory prosecutions by unnecessarily denying access to all relevant documentation. Again, while we appreciate the Working Group's comments that this is not the intent, the provision may have this effect.

## **II. CONCLUSION**

The CBA Sections suggest the draft proposal on privilege still requires changes in order for it to operate in the public interest as intended. However, we support the express goals of the proposal. The CBA Sections applaud the role of Self-Evaluative Audits and we would be pleased to continue to work with the CCIR to ensure its goals are met and balanced as against the interests of the public and the insurance industry.