

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

October 07, 2016

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

[Rebecca Bush](#)

Expertise

[Insurance Claim Defence](#)

---

**BLG | Canada's Law Firm**

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

**BLG Offices****Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3  
  
T 403.232.9500  
F 403.266.1395

**Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9  
  
T 613.237.5160  
F 613.230.8842

**Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2  
  
T 604.687.5744  
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4  
  
T 514.954.2555  
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3  
  
T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.