ICBC Injury Claims And Your Privacy: The Implied Undertaking Of Confidentiality

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When you sue for damages in the BC Supreme Court in an ICBC Injury Claim you are subject to certain rules of compelled disclosure. These rules require you to give verbal, documentary and even physical discovery (independent medical exams).

When ICBC gets access to this private information in the lawsuit process it is subject to an "*implied undertaking of confidentiality*". What this means is this information is not to be used by ICBC for purposes outside of the lawsuit.

If you have a further ICBC Claim involving similar injuries making the previous records relevant, can ICBC provide these records to their lawyer to be used against you in a subsequent claim? Reasons for judgement were released today addressing this issue and the answer is no, at least not without your consent or a court order.

In today's case (Chonn v. DCRS Canada Corp dba Mercedez-Benz Credit Canada) the Plaintiff had a history of ICBC Injury Claims. In the most recent claim the Defence Lawyer gathered documents from the previous claims and intended to use them in the current lawsuit. The Plaintiff objected to this. A motion was brought before the BC Supreme Court and Mr. Justice Voith was asked to decide whether "*the Insurance Corporation of British Columbia ("ICBC"), which, by operation of statute, had conduct of the defence of each of the Earlier Actions and has conduct of the Current Action, can list the documents it obtained from the plaintiff in the Earlier Actions without first obtaining the plaintiff's consent or leave of the court.*"

In answering this question Mr. Justice Voith summarized the law behind the "*implied undertaking of confidentiality"* and set out the limits of ICBC's use of records in subsequent claims. The highlights of the decisions are set out below:

[25] A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation.

[39] Once one recognizes that a central focus of the implied undertaking rule is to prevent the use of documents in subsequent litigation without consent or leave of the court, it is not sound to assert that Rule 26 displaces the application of the implied undertaking rule. Rule 26 is a rule of broad application and it governs virtually all civil actions. There are like provisions in most other jurisdictions. The result advanced by the defendants would significantly curtail the efficacy and ambit of the rule.

[40] The submission of the defendants would also significantly erode both policy objectives underlying the rule. It would impair the privacy interests of the party to the earlier action who made disclosure and gave discovery evidence. It would also subvert the policy objective of encouraging parties to "provide a more complete and candid discovery" referred to inJuman at para. 26.

[41] The intended purview of the "statutory exceptions" rule which is referenced by the Court in Juman, is limited to specific legislation which compels disclosure and which expressly overrides the privilege and/or confidentiality concerns of the holder of the information. Rule 26 does not achieve these objects. Though it requires disclosure from parties to litigation, both Rule 26(2) and the structure of Form 93 recognize the ongoing entitlement of a party to maintain a claim for privilege. While documents covered by an implied undertaking are

not, strictly speaking, privileged, I believe that it would be appropriate for a party, from whom document disclosure is sought, to list those documents in its possession which are subject to an implied undertaking under part 3 of its list of documents.

This case also addressed the remedies available when there is a breach of an implied undertaking and these are worth reviewing for anyone interested in BC Privacy Law.