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INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-08

INSURANCE CORPORATION OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
February 12, 2002

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Summary: The applicant insurance adjuster requested copies of two witness statements and an accident diagram, providing the consent of both witnesses in doing so. ICBC refused access under s. 14, citing litigation privilege. ICBC is authorized to withhold the records under s. 14 because they were created when litigation was in reasonable prospect and for the dominant purpose of that anticipated litigation.

Key Words: solicitor client privilege – litigation privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14.

Authorities Considered: B.C.: Order 00-23, [2000] B.C.I.P.C.D. No. 16.

Cases Considered: *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.); *Thiara* v. *Potrebenko*, [1991] B.C.J. No. 2368 (S.C., Master); *Catherwood (Guardian ad litem)* v. *Heinrichs* (1995), 17 B.C.L.R. (3d) 326 (S.C.); *Steeves et al* v. *Rapanos* (1982), 140 D.L.R. (3d) 121 (B.C.S.C.); *Baus* v. *Middleditch* (1985), 68 B.C.L.R. 81 (B.C.S.C.); *Vukovic* v. *Madill* (1995), 9 B.C.L.R. (3d) 78 (BCSC); *Shaughnessy Golf and Country Club* v. *Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (S.C.); *Zapf* v. *Muckalt*, [1995] B.C.J. No. 536 (S.C.); *Voth Bros. Construction (1974) Ltd.* v. *Board of School Trustees of School District No. 44 (North Vancouver) et al.* (1974), 29 B.C.L.R. 114 (C.A.); *Blackburn* v. *Watson*, [1997] B.C.J. No. 649 (S.C.); *Wade* v. *Ray*, [1997] B.C.J. No. 2877 (S.C.); *Oswell* v. *488780 B.C. Ltd.*, [1998] B.C.J. No. 260 (S.C., Master); *Rutherford* v. *Sagard*, [2001] B.C.J. No. 604 (S.C.); *Hodgkinson* v. *Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.).

1.0 INTRODUCTION

[1] The applicant in this case is an independent insurance adjuster. He wrote to the public body, the Insurance Corporation of British Columbia ("ICBC"), in May of 2000

and requested copies of two witness statements and an accident diagram. He provided the witnesses' written consent to the disclosure. ICBC replied, in September of 2000, by denying access to all of the records under s. 14 of the *Freedom of Information and Protection of Privacy Act* ("Act"). It told the applicant that it had obtained the statements and the diagram "with the reasonable anticipation of litigation", such that they were privileged. The applicant requested a review of this decision. As mediation was not successful in resolving the issue, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[2] The only issue in this case is whether ICBC is authorized by s. 14 of the Act to withhold the witness statements and a diagram. Under s. 57(1) of the Act, ICBC has the burden of proof in this case.

3.0 DISCUSSION

[3] **3.1 Solicitor Client Privilege** – Section 14 of the Act permits a public body to refuse to disclose information that is "subject to solicitor client privilege". Section 14 incorporates both branches of common law solicitor client privilege, legal professional privilege and litigation privilege. ICBC relies on the second, which protects records that came into existence for the dominant purpose of preparing for, advising on or conducting litigation that was under way or in reasonable prospect at the time the record came into existence.

[4] The records in issue here are transcripts of interviews, conducted by an insurance adjuster retained by ICBC, of two individuals who witnessed a motor vehicle accident. The transcripts are accompanied by an accident diagram, which was apparently initialled by both witnesses. Neither witness was involved in the accident, in which a pedestrian was struck by a car. The pedestrian later sued the car's driver, who is insured by ICBC. The driver is represented in that litigation by the same law firm that has represented ICBC in this inquiry. The disputed records are located in that law firm's files.

The Parties' Evidence and Argument

[5] ICBC's in-house adjuster, Rayman (or Raymon) Bacchus deposed that he was assigned to handle the pedestrian's personal injury claim file on September 27, 1999. He deposed that he specializes in cases in which the claimant is represented by a lawyer (which is not, of course, the same as specializing in cases that are being, or are likely to be, litigated). He was assigned to the file five days after ICBC received a letter from the lawyer retained by the pedestrian in connection with personal injuries allegedly sustained in the accident. I deal with that letter below.

[6] Bacchus deposed that, on ICBC's behalf, he retained an independent insurance adjuster, Kennedy Russell & Company (Vancouver) Ltd. ("Kennedy Russell"), to investigate the claim. Kennedy Russell was retained on September 27, 1999. Bacchus

deposed as follows regarding the circumstances that surrounded the taking of the witness statements:

> 8. THAT [*sic*] after I was assigned conduct of … [the pedestrian's] personal injury claim I became aware that … [the driver] was stating that … [the pedestrian] walked out from in between two parked cars mid-block and crossed in front of his vehicle and that he could not stop in time to avoid striking the pedestrian. As such I knew that liability for the Accident would be a hotly contested issue.
>
> 9. THAT given the seriousness of the accident and the fact that … [the driver] was asserting that the Accident was not his fault and given the early involvement of G.W. Kent Scarborough as counsel for … [the pedestrian] left me with no doubt that this matter was going to be litigated.
>
> 10. THAT on September 27, 1999 I retained the services of Kennedy Russell & Company (Vancouver) Ltd. to investigate this claim, including the taking of witness statements, solely on the basis of what I perceived to be pending legal action by … [the pedestrian] and solely to assist defence counsel in defending the claim I was certain to be brought by … [the pedestrian].
>
> 11. THAT as a result of these instructions Michael Russell from Kennedy Russell & Company (Vancouver) Ltd. obtained statements on October 10, 1999 from … [witness's name] and his wife … [other witness's name] who had both witnessed the Accident.
>
> 12. THAT the reason why I instructed Kennedy Russell & Company (Vancouver) Ltd. to obtain witness statements was in order to obtain all information and evidence while it was fresh in the minds of the persons involved, in order to assist ICBC, being the insurers of … [the driver], and the defence counsel who would be appointed to defend … [the driver] once litigation was commenced by … [the pedestrian] in thoroughly defending the claims that I thought would certainly be brought by … [the pedestrian].
>
> 13. THAT there was no other additional purpose to obtaining the statements, other than developing evidence and information that would be used in defending the claims of … [the pedestrian] against … [the driver].
>
> 14. THAT I can not think of any other reason or purpose to obtain the aforementioned witness statements other than with respect to litigation, as there were no breach issues being considered, the statements would not be relevant to any Part 7 [*Insurance (Motor Vehicle) Act*] payment issues [regarding no-fault benefits under Part 7] and the statements would not be relevant with respect to any other material damage issue.
>
> 15. THAT there was a sense of urgency surrounding the obtaining of witness statements given the involvement of counsel and the seriousness of the injuries sustained by … [the pedestrian] in order to secure the witnesses' evidence for use by defence counsel.
>
> 16. THAT at the time I assigned Kennedy Russell & Company (Vancouver) Ltd. to investigate there was no doubt in my mind that this matter would proceed to litigation.

[7] As Bacchus' evidence indicates, a Kennedy Russell representative interviewed the two witnesses on October 10, 1999. According to Bacchus, the pedestrian sued ICBC's insured on January 27, 2000, seeking damages for personal injuries allegedly suffered in the accident.

[8] ICBC summarizes its arguments as follows in its initial submission:

> 7. The Statements are eyewitness accounts of an accident which is now the subject of litigation and are contained in defence counsel's file material.
>
> 8. It is ICBC's submission that the Statements are privileged under solicitor client privilege and remain protected from disclosure by section 14 of the *Freedom of Information Act* which incorporates the common law principles of privilege. It is established that the basis for privilege, attaching to witness statements, is said to be based upon "work product" or "solicitor's brief or file status" and such statements do not become a producible document unless the party applying for production demonstrates witnesses[']evidence cannot otherwise be obtained.
>
> 9. In addition, as deposed by Raymon Anthony Bacchus in his affidavit sworn June 25, 2001 the dominant purpose for which the Statements were taken was to secure the evidence of the Applicants to assist defence counsel in the contemplated litigation arising out of the injuries sustained by … [the pedestrian] in the accident.

[9] ICBC cites a number of court decisions in which it was held that statements of independent witnesses are privileged, such that the party possessing the statements does not have to produce them. ICBC also points out that, at the time Kennedy Russell obtained the statements, the pedestrian had retained legal counsel. ICBC was also aware that the pedestrian had, in a written statement provided to ICBC by his lawyer, claimed that he had suffered severe injuries as a result of the accident.

[10] ICBC also believed, it says, that there was a serious issue about liability for the accident. The driver had alleged to ICBC that the pedestrian walked out into the road in front of him, such that he had no time to avoid striking the pedestrian. Although it is not clear how the driver provided this information to ICBC, it may have been through the statement that drivers are statutorily compelled to provide about accidents.

[11] ICBC argues it was clear, by the time ICBC hired Kennedy Russell to investigate the accident, that the pedestrian would sue and says "the dominant purpose behind obtaining the statements was to secure and preserve" the evidence "in order to assist defense counsel in defending the action which ICBC was sure would be commenced by" the pedestrian (paras. 27-34, initial submission).

[12] ICBC also argues that, where litigation is under way or contemplated, it would hamper its legal counsel's ability to fully investigate the facts and circumstances surrounding a matter if witnesses were later able to request a copy of their statements. ICBC does not elaborate on this assertion. Once a statement is taken from a witness,

ICBC argues, it forms part of the solicitor's brief and only ICBC, not a witness, may waive privilege over this record (para. 35, initial submission).

[13] ICBC also points out at paras. 2-4 of its reply submission, and supported by Bacchus' affidavit, that the applicant contacted Kennedy Russell in November of 1999 and asked for copies of the witness statements. The applicant is reported as having told Kennedy Russell, at the time, that he was acting for the pedestrian's lawyer. ICBC argues, therefore, that this is a situation where a party to the litigation is seeking copies of third party statements. ICBC says that, according to the cases referred to above, the statements are privileged and need not be disclosed.

[14] For his part, the applicant relies heavily on the witnesses' signed consents to disclosure. Noting that these are the witnesses' own statements, and that they each simply wish a copy of their statements, he says the following at pp. 1-2 of his initial submission:

> This is not a circumstance where a party to litigation is trying to obtain a third party statement. The authorizations which have been provided to ICBC are signed by the individuals who gave the statement and it is those individuals which want copies of their statements provided to their agent.
>
> The action of ICBC in refusing to provide individual statement [*sic*] which they have given is contrary to the intent of the *Freedom of Information and Protection of Privacy Act*. The Insurance Corporation of British Columbia has documentary evidence signed by an individual and it is that individual which wishes a copy of it. There is no basis for ICBC to claim solicitor and client privilege when it is the individual's own statement which is requested for production.

[15] This argument is picked up again in the applicant's reply submission, as follows:

> The written submissions of ICBC fail to take into consideration that the Freedom of Information authorizations were signed by the individuals who gave the statement. The issue of solicitor/client privilege only protects ICBC from disclosing statements to the party which is adverse in interest. In this case, from the review of the Affidavit, that would appear to be if Mr. Scarborough, who acts as counsel for the injured party, … [the pedestrian], was attempting to obtain the information pursuant to a Freedom of Information request signed by his client, … [the pedestrian].
>
> In this case the Freedom of Information authorizations are signed by the individuals who gave the statement and they are entitled to receive a copy of the information which they supplied to ICBC. The information which they gave is not protected by solicitor/client privilege as they are not a party to the litigation but a witness. This is a case where a witness is being refused a copy of the statement which he or she gave under the guide of privilege.

[16] ICBC's evidence that the applicant was, in fact, at one time acting for the pedestrian's lawyer is hearsay, but it suffices to establish that the applicant has in the past acted in the pedestrian's interests through his legal counsel. This is, therefore, a case in

which a party to litigation, who is adverse in interest to ICBC, is seeking disclosure of the witness statements. In any case, as I indicate below, nothing in the Act supports the proposition that, even if the witnesses themselves sought copies of their statements, their rights would override ICBC's privilege in the statements.

Was Litigation in Reasonable Prospect?

[17] Litigation in this case started after the witness statements were taken. Since litigation was not actually under way at that time, the question is whether it was in reasonable prospect at the time the statements were taken. The test was put this way by the Court of Appeal in *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.), at p. 261:

> [L]itigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.

[18] In this respect, this case has some similarities to, for example, Order 00-23, [2000] B.C.I.P.C.D. No. 16. In that case, the public body had created a number of records after receiving correspondence from a lawyer acting for the surviving spouse of a deceased public body employee. At p. 9, I noted that "[g]iven the other evidence as to the reasonable prospect of litigation, such a letter need not expressly threaten litigation for it to function as an indicator of litigation." It was clear, both from the content of the correspondence and other material before me in that case, that there was a reasonable prospect of litigation at the relevant time.

[19] Here, I have the evidence of ICBC's adjuster that he believed, for the reasons given in the above-quoted passage from his affidavit, that litigation was inevitable. His belief would not be determinative of this issue on its own. Among other things, para. 14 of Bacchus' affidavit, which is quoted above, cannot be taken as definitive in terms of possible uses for witness statements in such cases. Independent circumstances, however, support Bacchus' assessment of the prospect of litigation:

1. There was evidence soon after the accident, based on the driver's statement to ICBC, that there would almost certainly be a dispute over liability for the accident.

2. The pedestrian retained a lawyer soon after the accident.

3. The lawyer's September 22, 1999 letter to ICBC contained a revocation of all authorizations the pedestrian had given to ICBC and demanded that ICBC produce all relevant information to the lawyer (including witness statements, medical reports, police accident reports, names of witnesses and names of treating physicians).

4. The lawyer's letter enclosed a statement signed by the pedestrian. The pedestrian disclosed his 1998 income and stated that he was unable to work because of the accident. The statement also gave details of his alleged injuries.

5. ICBC's adjuster retained the services of Kennedy Russell on September 27, 1999, to investigate the accident, after the pedestrian's lawyer wrote to ICBC.

[20] I am satisfied that these factors, taken together, establish that litigation was in reasonable prospect at the time the disputed records were created on October 10, 1999.

Dominant Purpose for the Statements

[21] The next part of the litigation privilege test is whether the dominant purpose for creation of the record was preparing for, advising on or conducting the anticipated litigation. In addressing this question, I have borne in mind the following passage from *Hamalainen*, above, at p. 262:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other word, [*sic*] there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[22] I accept that the focus of ICBC's inquiries had, by the time the statements were taken, shifted to preparing ICBC for the anticipated litigation and that this was the dominant purpose for the creation of the statements. I make this finding, despite the fact that the statements were taken early in the process, in light of the affidavit evidence and other circumstances described above. The dominant purpose for taking the statements, in my view, was not accident investigation, claims investigation or adjustment, or for deciding questions relating to no-fault medical benefits, but for the dominant purpose of anticipated litigation.

[23] I find that the disputed records are protected by litigation privilege and that ICBC is authorized by s. 14 of the Act to refuse to disclose them.

[24] To be clear, not every statement ICBC gets from a witness or an insured – whether directly, through an adjuster retained by ICBC, or through someone else – will be privileged under the dominant purpose test for litigation privilege. Where ICBC is investigating an accident and obtains statements, it will not be enough to say that, because *any* accident claim might conceivably go to litigation, the witnesses' or insured's statements are privileged. Each case turns on its particular facts, as established through

affidavit evidence and, in some cases, the disputed records themselves. As Master Horn said in *Thiara* v. *Potrebenko*, [1991] B.C.J. No. 2368, at p. 2:

> There is no special rule applicable to an adjuster's report. The fact that litigation is a reasonable prospect after any motor vehicle accident and the fact that that prospect is one of the predominant reasons for the creation of the document is not enough. Unless such purpose is, in respect of each particular document, the dominant purpose for creating the document, it is not privileged.

[25] The same can be said, in my view, about witness statements in respect of which ICBC claims litigation privilege.

Irrelevance of Witnesses' Authorizations for Disclosure

[26] As intimated above, I disagree with the applicant's contention that, because the witnesses have consented to disclosure, ICBC cannot refuse under s. 14 to give up their statements. The applicant argues that he is an agent for the two witnesses, who have signed authorizations for ICBC to disclose their statements to him. He says they are not involved in litigation with ICBC and simply want their own statements. Solicitor client privilege does not apply, he argues, where individuals are asking for their own statements. Even if the witnesses had asked for the statements in their own right and not, as I believe, on the pedestrian's behalf, their consent cannot defeat ICBC's privilege in these records. Once litigation privilege attaches to the records' contents, to ICBC's benefit, it is beyond the witnesses' power to compel their production under the Act despite that privilege. This view is consistent with *Catherwood (Guardian ad litem)* v. *Heinrichs* (1995), 17 B.C.L.R. (3d) 326, in which Hood J. held – albeit in a case that arose outside of s. 14 of the Act – that a witness's consent to disclosure of his statement did not defeat privilege over the statement.

A Special Rule for Statements by Independent Witnesses?

[27] Although I have found that the disputed records are protected by litigation privilege under s. 14, I will address, in passing, ICBC's alternative submission that the records are protected because, as ICBC argues at para. 21 of its initial submission, British Columbia cases establish that

> … independent witness statements have been treated at common law as a separate class of documents which do not require the party claiming privilege to satisfy the above mentioned dominant purpose test.

[28] ICBC says that statements made by independent witnesses – as opposed to statements made by parties to the litigation – need not satisfy the dominant purpose test for litigation privilege. It cites the decisions of Bouck J. in *Steeves et al* v. *Rapanos* (1982), 140 D.L.R. (3d) 121 (S.C.) (aff'd on another point at 142 D.L.R. (3d) 556 (C.A.)), and *Baus* v. *Middleditch* (1985), 68 B.C.L.R. 81 (S.C.). ICBC says the decision of Holmes J. in *Vukovic* v. *Madill* (1995), 9 B.C.L.R. (3d) 78 (S.C.) confirms that *Steeves*

has survived the Court of Appeal decisions in *Shaughnessy Golf and Country Club* v. *Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309, and *Hamalainen*, above. ICBC also refers to a number of other British Columbia Supreme Court decisions in which, it says, *Steeves* has been applied since the *Shaughnessy Golf and Country Club* decision.

[29] In *Steeves*, Bouck J. decided that statements given by independent witnesses, as opposed to parties to the litigation, should be treated differently than other records when it comes to protecting them from production to the other party in litigation. Having reviewed United States and English cases on the topic, he said the following at p. 134:

> As in any emerging area of the law, one must confront competing ideas. On the one hand, the law tends to favour complete and frank disclosure so as to avoid trial by ambush. Witnesses should not be unnecessarily harassed. If this can be accomplished by the production of one statement, so much the better. An exchange of statements helps to reduce the cost of litigation.
>
> But there is an equally persuasive argument on the other side. Why should one party get a "free ride" on the other's investigative efforts? If that is encouraged, the less energetic party will receive all the information from the other side by way of witness's statements without making any effort to obtain them for himself.
>
> I believe the best way to resolve it is by the burden of proof method. Where a court must decide whether a particular piece of evidence is caught by the solicitor-and-client rule of privilege, the law places the onus upon the party resisting disclosure: *Waugh* v. *British Railways Board*, *supra* [[1979] 2 All E.R. 1169 (H.L.)]. However, in my view, when it comes to deciding if the statement of an ordinary witness is privileged, the burden of proof should be on the party demanding its discovery rather than on the party resisting. What tips the scales in this direction for me is the desirability that each side should conscientiously prepare its own case. In that way, there is more likelihood the truth will unfold. Also, our rules of court allow an inquiring party to obtain the evidence from an independent witness prior to trial.

[30] At p. 132, Bouck J. suggested that any protection for witnesses' statements "falls more within the realm of public policy concerning the inviolability of a lawyer's file than it does within the rule of solicitor-and-client privilege." At p. 133, he referred to "the confidentiality of the statement of an ordinary witness" as "a new rule of privilege". He also referred to decisions in other provinces in which independent witnesses' statements have been protected.

[31] In *Thiara*, above, Master Horn considered *Shaughnessy Golf and Country Club* and decided that it had implicitly overruled *Steeves*. At pp. 3-4 of *Thiara*, he said the following about the effect of *Shaughnessy Golf and Country Club* on *Steeves*:

> But I do not think these three cases [*Steeves*, *Baus* and *Insurance Corporation of British Columbia* v. *Koopman* (1986), 5 B.C.L.R. (2d) 349 (S.C.)] can be reconciled with the decision of the Court of Appeal in *Shaughnessy Golf & Country Club* v. *Uniguard Services Ltd.* (*supra*). In that case there was a claim of privilege made for documents, including witnesses' statements, taken by an

> adjuster investigating a fire claim. The investigation commenced as a loss adjustment but soon became an investigation as to whether the insurer of the premises might have a subrogated claim against persons responsible for the fire. The court held that at a certain point in the investigation, all matters of concern, other than subrogation, had become relatively insignificant and that after that date the dominant purpose in creating the disputed documents was the pursuit of litigation. *But as to the witness statements which were taken before that date, the court held (at page 322) that "statements obtained for the purpose of litigation have generally been regarded as privileged. The earliest statements … would seem clearly not to be entitled to privilege for the same reason which leads to the conclusion that the earliest reports were not privileged – the necessary dominant purpose was not present." The issue raised in the above three cases was not addressed by the court but the result in Shaughnessy Golf & Country Club v. Uniguard Services Ltd. is not reconcilable with the results in the above three cases. I feel bound to apply the principles set out by the Court of Appeal.* [added emphasis]

[32] As the above passage indicates, Esson J.A., in *Shaughnessy Golf and Country Club*, treated witness statements taken early in the process as not being privileged because they did not meet the ordinary dominant purpose test. This basis for finding the statements were not privileged does not sit well with Bouck J.'s approach in *Steeves*, although it does not definitely oust the *Steeves* analysis.

[33] On the other hand, in *Vukovic*, above, Holmes J. – in an oral judgement on appeal from the decision below of Master Chamberlist (as he then was) – considered *Shaughnessy Golf and Country Club* and *Hamalainen* and, disagreeing with Master Horn in *Thiara*, decided that neither of them overturned *Steeves*. He concluded that the Court of Appeal in *Shaughnessy Golf and Country Club* had not been asked to, and did not, consider the *Steeves* approach. He therefore overturned the decision of Master Chamberlist, who had decided that *Steeves* had implicitly been overruled by *Shaughnessy Golf and Country Club* and *Hamalainen*.

[34] I have read the cases in which, ICBC says, *Steeves* has been applied in recent years. As I read them, in two of the cases the Court actually applied the dominant purpose test to witness statements. In *Catherwood*, above, Hood J. applied the dominant purpose test to the statement of an independent witness. Similarly, in *Zapf* v. *Muckalt*, [1995] B.C.J. No. 536, Low J. (as he then was) applied the dominant purpose test in holding that witness statements were privileged. In doing so, he relied on the Court of Appeal's decision in *Voth Bros. Construction (1974) Ltd.* v. *Board of School Trustees of School District No. 44 (North Vancouver) et al.* (1974), 29 B.C.L.R. 114, which Bouck J. had expressly applied to the insured's statement in *Steeves*.

[35] In *Blackburn* v. *Watson*, [1997] B.C.J. No. 649, another case referred to by ICBC, Master Chamberlist adverted to the decision of Holmes J. in *Vukovic* and decided that he was bound to follow that decision and apply *Steeves*. He had, again, decided at first instance in *Vukovic* that *Steeves* had been overruled by *Shaughnessy Golf and Country Club* and by *Hamalainen*.

[36] The decision of Sinclair Prowse J. in *Wade* v. *Ray*, [1997] B.C.J. No. 2877, also adopted the *Steeves* approach. Sinclair Prowse J. noted, at para. 7, that there was "no dispute" before her that independent witness statements do not have to be produced unless there is no other practical method of acquiring the information and, without discussion, cited *Steeves* and *Vukovic* on this point.

[37] In *Oswell* v. *488780 B.C. Ltd.*, [1998] B.C.J. No. 260, Master Powers (as he then was) applied *Steeves*, again without mentioning the issue of its ongoing influence. Last, in *Rutherford* v. *Sagard*, [2001] B.C.J. No. 604, Master Horn applied *Steeves*, expressly referring to the decision of Holmes J. in *Vukovic*. I infer he accepted – as had Master Chamberlist in *Blackburn*, above – that Holmes J.'s views about *Steeves* were binding on him, despite his own earlier decision in *Thiara*.

[38] Having read these cases, I have reservations about whether *Steeves* has survived the *Shaughnessy Golf and Country Club* and *Hamalainen* decisions of the Court of Appeal. It is also not clear how Bouck J.'s conception of lawyer's brief privilege, both as to its foundation and scope, is to be treated in light of the Court of Appeal's later decision about the foundation and scope of lawyer's brief privilege, in *Hodgkinson* v. *Simms* (1988), 33 B.C.L.R. (2d) 129, and later cases on that subject. In raising doubt about *Steeves*, I readily acknowledge that some of the decisions cited by ICBC have, as indicated above, treated *Steeves* as having survived, in light of *Vukovic*, the above-cited Court of Appeal decisions. This is not the case in which to address these issues or to deal with the question of whether it is, in any event, open to me to stray from *Steeves*.

4.0 CONCLUSION

[39] For the reasons given above, under s. 58(2)(b) of the Act, I confirm ICBC's decision to refuse the applicant access to the disputed records.

February 12, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia