Order F06-19

INSURANCE CORPORATION OF BRITISH COLUMBIA

Bill Trott, Adjudicator
October 10, 2006

Quicklaw Cite: [2006] B.C.I.P.C.D. No. 32
Document URL: http://www.oipc.bc.ca/orders/OrderF06-19.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: Applicant requested her ICBC claim files and files from her ICBC-appointed lawyer. ICBC disclosed many records, but refused access to others. Sections 14, 17 and 22 found to apply to some other remaining information. Section 14 found not to apply to two pages and s. 22 found not to apply to several records.

Key Words: duty to assist—adequacy of search—respond without delay—respond openly, accurately and completely—every reasonable effort—legal advice—solicitor-client privilege—financial or economic information—monetary value—unreasonable invasion—personal privacy—employment history—fair determination of rights.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6, 13, 14, 17, and 22.

Authorities Considered: B.C.: Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 01-25, [2001] B.C.I.P.C.D. No. 26; Order 01-46, [2001] B.C.I.P.C.D. No. 48; Order 03-28, [2003] B.C.I.P.C.D. No. 28; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-41, [2001] B.C.I.P.C.D. No. 42; Order 02-08, [2002] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order 00-52, [2000] B.C.I.P.C.D. No. 56; Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order F05-02, [2005] B.C.I.P.C.D. No. 2; Order 01-07, [2001] B.C.I.P.C.D. No. 7.

Cases Considered: *British Columbia (Ministry of Environment, Lands and Parks and others) v. British Columbia (Information and Privacy Commissioner of British Columbia)* [1995] B.C.J. No. 2594*; Legal Services Society v. B.C. (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372*; Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39; *College of Physicians and Surgeons of B.C. v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 2779*; Ontario (AG) v. Ontario (Information and Privacy Commission, Inquiry Officer)* [2002] 62 O.R. (3d) 167*; B. v. Canada* [1995] 5 W.W.R. 374*; Chersinoff v. Allstate*

Insurance Co. (1968), 69 D.L.R. (2d) 653 (BCSC) and (1969) 3 D.L.R. (3d) 560 (BCCA); *Hopkins (Committee of Estate) v. Wellington* (1999), 68 BCLR (3d) 152 (BCSC)*; Maranda v. Richer* 2003 SCR 93*; Armand v. Carr* [1927] 2 C.L.R. 720, [1927] SCR 348, 60 O.L.R. 293; *In Re Crocker* [1936] 2 All E.R. 899*; Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254*; Saric v. Toronto-Dominion Bank* [1999] B.C.J. No. 1712 (C.A.)*; Lavigne v. Canada (Office of the Commissioner of Official Languages)* [2002] 2 S.C.R. 773*; B.C. Teachers' Federation (Nanaimo District Teachers' Association et al) v*. *British Columbia* (*Information and Privacy Commissioner et al)* 2006 BCSC 131*; Hunt v. Atlas Turner Inc.* [1995] B.C.J. No. 758 (C.A.)*; Discovery Enterprises Inc. v. Ebco Industries Ltd.* [1998] B.C.J. No. 183 (S.C.)*; Children's Lawyer for Ontario v. Goodis* [2004] O.J. No. 965.

1.0 INTRODUCTION

[1] This request for review arises from a three-car collision. The applicant was the driver of the second car in what is known as a chain-reaction collision. The applicant commenced legal action against the owners of the first and third cars. (This is referred to as the "Victoria action".) Several months later, the owner of the first car commenced legal action against the applicant and the owner of the third car. (This is known as the "New Westminster action".) The applicant was, therefore, the plaintiff in one action and defendant in the other, with both actions related to the same accident. The court ordered that the liability aspects of the two actions be severed from the trial of the quantum aspects of both cases and that the liability aspects be heard separate from, and prior to, the trials of the quantum aspects for both cases.

[2] At the conclusion of a five-day trial on the liability issues of both actions, the court found the applicant 100% at fault for rear-ending the first car and dismissed her action against the owners of the first and third car. The applicant issued two notices of appeal, but only the issue of the liability of the owner of the third car proceeded to the Court of Appeal. After the close of submissions in this inquiry, the Court of Appeal dismissed the appeal. I also understand from the parties that the issue of quantum has been settled.

[3] In addition to the actions described above, the applicant commenced an action under Part 7 of the Revised Regulations under the *Insurance (Motor Vehicle) Act,* B.C. Reg. 447/83, for no-fault accident benefits against the Insurance Corporation of British Columbia ("ICBC"). (This is known as the "Part 7 action".) This action covers such items as medical and rehabilitation benefits and total temporary disability benefits for employed persons. This action was held in abeyance until the completion of the other actions.

[4] At the time the parties made their initial submissions in this inquiry, the Court of Appeal matter was undetermined and the quantum issues remained unresolved, and the parties made their submissions within that particular context. Further, it was not clear in this inquiry, until some time after the initial and reply submissions were received, that the Part 7 action existed.

[5] During the course of the initial submissions, ICBC reconsidered its original decision and disclosed further information. In addition, I asked ICBC to reconsider its

position in relation to the remaining records when it came to my attention that the quantum actions had been settled. As a result, ICBC disclosed further records on July 13, 2005 and August 10, 2005.

[6] I have approached the review of ICBC's decision to withhold certain information by considering the circumstances after the Court of Appeal decision, and noting the settlement of the quantum portion of the actions and the existence of the Part 7 action. At the time of writing this decision, the only outstanding action is the Part 7 action.

[7] All parties were insured by ICBC. ICBC appointed the applicant's counsel to defend her in the action that the owner of the first car (New Westminster action) commenced. ICBC appointed another lawyer to defend the third car's owner in both actions. ICBC appointed a third lawyer to defend the first car's owner in the Victoria action. The plaintiffs in both actions retained separate lawyers. The applicant has counsel in the Part 7 action and ICBC has retained outside counsel to defend the Part 7 litigation.

[8] In her initial submission, the applicant refers to six access requests (dated January 2 and 14, 2002, March 11 and 27, 2002, April 4, 2002 and August 23, 2002) to ICBC. In her request for review, dated November 7, 2002 to the Office of the Information and Privacy Commissioner, the applicant stated she had made three requests, two in January 2002 and one in March 2002. ICBC has combined these three requests into one access request file. After an initial request for review, the parties agreed that there would be a new request for records, encompassing all the records responsive to the original requests. I understand from the parties that there is one consolidated request dated August 23, 2002. In that request the applicant asked for:

> 1) a complete copy of any and all records ICBC has in its custody and control including, but not limited to, [two claim numbers], as well as complete copies of pages 1-1089 as noted in [ICBC's] Guide to Release [access request number]; and
>
> 2) a complete copy of all off-sight [*sic*] records of [her legal counsel] appointed by ICBC to act on [her] behalf [in the action commenced by the owner of the first car].

[9] On October 7, 2002, ICBC responded by releasing 2073 pages, in severed form, comprising the content of claim files and a specific record from the files of the lawyer appointed by ICBC to represent the owner of the third car in the two actions. On October 18, 2002, ICBC provided another 2340 pages, in severed form, from the files of the lawyer appointed by ICBC for the applicant. On November 7, 2002, the applicant requested a review of the decision to withhold or sever records.

[10] After the issuance of the notice of inquiry, and several adjournments, ICBC released additional records. ICBC explains this additional release in its initial submission as the result of a reconsideration of its position on ss. 14, 15 and 17 "in light of the complex issues relating to the applicant's role as both a plaintiff and defendant in

relation to the same motor vehicle accident".[1] In addition, ICBC disclosed further records after it considered the impact of the settlement of the outstanding claims, noting the continuation of the Part 7 action. This review covers the remaining severed and withheld records from both the internal claim files and the files of the applicant's ICBC-appointed lawyer.

[11] The records consist of five internal claim files:

a) the applicant's original claim file (pp. 1-672);
b) a second claim file for the applicant (pp. 673-678)
c) the first car owner's claim file (pp. 679-1284)
d) the third car owner's claim file (pp. 1285-1390)
e) the applicant's bodily injury package (pp. 1989-1996).

[12] There is also the file from the applicant's lawyer, whom ICBC appointed ("the defence file").

2.0 ISSUE

[13] The notice of inquiry lists the following sections in dispute: ss. 13, 14, 15, 17, 20 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). On April 5, 2003, ICBC released additional records which it had formerly withheld under ss. 14, 15 and 17. In its initial submission, ICBC explains that it relies on ss. 13, 14, 17 and 22 of FIPPA for the remaining severed or withheld information. I received further submissions from the parties following my request that ICBC reconsider its position, taking into account the conclusion of most of the litigation. ICBC made two further releases, July 13, 2005 and August 10, 2005. I will review the severing contained in the two Guides to Release which accompany the April 5, 2003 decision;[2] and the Guides to Release dated July 13, 2005 and August 10, 2005. I have appended to this order a modified version of the guides as a means of assisting the parties. I understand that ICBC no longer relies on ss. 15 and 20. Therefore, I will not be reviewing the application of those sections.

[14] In her initial submission, the applicant raises for the first time ICBC's duty under s. 6 of FIPPA to make every reasonable effort to assist the applicant and to respond openly, accurately and completely. ICBC does not object to the applicant raising this issue and has provided a full response in its reply submission. Therefore, I will consider the issue.

[15] The issues in this inquiry are as follows:

1. Whether ICBC is authorized by s. 13, 14 or 17 of FIPPA to refuse to disclose information to the applicant,

[1] ICBC initial submission, para. 11.
[2] As attached to Luther Affidavit #1, ICBC initial submission, Exhibit F.

2. Whether ICBC is required by s. 22(1) of FIPPA to refuse to disclose personal information to the applicant,

3. Did ICBC fulfill its duty under s. 6 of FIPPA in its responses to the applicant's requests for information?

[16] Under s. 57(1) of FIPPA, ICBC bears the burden of proof on the first issue. Under s. 57(2), the applicant bears the burden regarding the second issue. As both parties have submitted arguments on the s. 6 issue, I have reviewed both positions.

3.0 DISCUSSION

[17] **3.1 Procedural Objection**—In her October 2, 2005 letter to this Office and in her October 5, 2005 submission, the applicant objects to ICBC's submission of *in camera* material as part of its August 15, 2005 submission. The applicant requests that I use my discretion and not consider the materials provided by ICBC on an *in camera* basis. ICBC also provided *in camera* material in its initial submission. I have examined the *in camera* material submitted by ICBC in both its initial submission and its August 15, 2005 submission and I am satisfied that ICBC's *in camera* material is properly received on that basis.

[18] Further, in her October 5, 2005 submission, the applicant objects to ICBC including additional argument on legal advice privilege in its August 15, 2005 submission. The applicant argues ICBC asserts only litigation privilege with respect to the Part 7 action. The applicant objects to ICBC introducing new caselaw and argument in support of its original submission on legal advice privilege. The applicant states ICBC has used the new argument to "enrich its initial submission of legal advice privilege over records pertaining to tort actions".[3]

[19] The applicant states that ICBC "has neglected and/or failed to heed the direction of the Office of the Information and Privacy Commissioner in its letter of July 20, 2005, and has not related its submission of legal advice privilege to the records which it believes are caught by the Part 7 action."[4]

[20] It would appear that two portions of ICBC's August 15, 2005 submission are in question. The first part covers ICBC's use of two cases and an order of the Commissioner and its subsequent discussion of these cases.[5] In addition, the Luther affidavit #2, paras. 2 and 3, appears to fit within the applicant's objection.

[21] On May 18, 2005, I wrote to ICBC notifying counsel that it had just come to my attention that it appeared both actions (Victoria and New Westminster) were concluded. If that was the case, I requested ICBC to review the severing, in particular, but not

[3] October 5, 2005 submission, paras. 10, 16 and 17.
[4] October 5, 2005 submission, para. 17.
[5] August 15, 2005 submission, paras. 6 to 10.

limited to, the severing under ss. 14 and 17 of FIPPA in light of these developments and submit any remaining severing of the records. On June 1, 2005, ICBC explained the Part 7 litigation was outstanding. As noted above, on July 13 and August 10, 2005, ICBC released further records.

[22] On July 20, 2005, the Registrar wrote to ICBC offering it the opportunity to make any submissions on its application of s. 14 and/or s. 17 of FIPPA to the records it believed were caught by the Part 7 benefits litigation and provided the applicant the opportunity to respond.

[23] The applicant objects to ICBC relying on two additional cases: *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)*[6] and *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*.[7] In addition, ICBC relies on Order 03-28.[8]

[24] ICBC's August 15, 2005 submission[9] discusses the general principles of the caselaw with respect to understanding the difference between the two branches of solicitor-client privilege. As the applicant has had full opportunity to respond, and has done so in the October 5, 2005 submission, I have accepted the ICBC addition of these cases and the applicant's reply on legal advice privilege.

[25] Further, Luther Affidavit #2, attached to ICBC's August 15, 2005 submission,[10] introduces evidence with respect to records over which ICBC has claimed legal advice privilege. These two statements are general descriptions of two types of records, suit reports and internal communications from or to ICBC staff lawyers. Generally, the Commissioner has discouraged the late addition of new sections and evidence. However, he has, on occasion, accepted such late additions (see for example Order No. 331-1999[11]). Given the complexity of this matter, the variety of records involved in this request and that the applicant had an opportunity to respond to this material, I have allowed ICBC to submit these paragraphs.

[26] **3.2 Section 14**—Section 14 of FIPPA permits a public body to refuse to disclose information that is protected by solicitor-client privilege.

[27] After ICBC's reconsideration of its position in 2003, Doug Luther, Information Officer, ICBC, deposes that he "was instructed to release the records withheld on the basis of ss. 14 and 17 in relation to the applicant's defence although I was directed to continue to maintain privilege with respect to communications with defence counsel for the [owner of the first car] and [the owner of the third car] and reserve information."

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[6] [1995], B.C.J. No. 2594.
[7] [2002] 62 O.R. (3d) 167 (Ont. C.A.).
[8] [2002] B.C.I.P.C.D. No. 28.
[9] Paras. 4 to 9.
[10] Paras. 2 and 3.
[11] [1999] BC.I.P.C.D. No. 44 at p. 19.

After the 2003 reconsideration, ICBC continued to apply s. 14 to records relating to:

a) the defence of the two other car owners;

b) the applicant's request to fund an appeal of the liability court decision;

c) the applicant's action against the owner of the first car (the Victoria action); and

d) the communications between the lawyer appointed by ICBC to defend the applicant in the New Westminster action and ICBC's Corporate Law Department concerning the applicant's access to information request.

[28] ICBC's August 15, 2005 submission modified this 2003 position. In the 2005 submission, ICBC applies s. 14 to the following categories of information:

a) "all direct communication with its legal advisors in respect of the applicant's tort claims against [the owners of the other two cars] and in respect of the [the New Westminster action]";

b) "the amount of legal fees paid and legal accounts submitted in relation to those claims";

c) "internal notes generated by ICBC staff following discussions with various defence counsel and investigative material", which ICBC argues contain information about the applicant's "injuries, ability to work and claims for past and future wage loss [which] continue to be highly relevant to the Part 7 claim".

[29] As indicated below, ICBC continues to apply s. 14 to records about a request to fund an appeal of the court decision on liability.

[30] Section 14 codifies the common law rules of privilege, encompassing both legal advice privilege and litigation privilege. (See *British Columbia (Ministry of Environment, Lands and Parks and others) v. British Columbia (Information and Privacy Commissioner of British Columbia*, *Legal Services Society v. B.C. (Information and Privacy Commissioner)*[12] and *Blank v. Canada*.[13]) In the *College of Physicians and Surgeons of B.C. v. British Columbia (Information and Privacy Commissioner),*[14] the court stated:

> [t]he question is only whether the Documents are subject to solicitor client privilege as defined at common law.

[31] ICBC has invoked both branches of the privilege. I will discuss them separately. ICBC applied legal advice privilege to its direct communications with legal counsel for

[12] (1996), 140 D.L.R. (4th) 372, at paras. 25-6 (BCSC).
[13] [2006] S.C.J. No. 39.
[14] [2002] B.C.J. No. 2779, at para. 25.

the owners of the first and third cars in the Victoria action and counsel in the New Westminster action. It also applied legal advice privilege to internal communications with its staff lawyers. In addition, it applied legal advice privilege to legal fees paid and legal accounts submitted. Further, ICBC relied on litigation privilege for information which it considered relevant to the Part 7 action.

[32] The B.C. Court of Appeal in the *College of Physicians and Surgeons of B.C.* at paras. 30 and 31 discussed the difference between the two privileges:

> [30] Each of the two types of privilege has a different scope because they serve different purposes. Legal advice privilege serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy (the individual's ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial process (see ***Gower*** at para. 15; ***Chrusz*** at paras. 91-4). Litigation privilege, on the other hand, is geared towards assuring counsel a "zone of privacy" and protecting the lawyer's brief from being poached by his or her adversary (see ***Chrusz*** at paras. 22-4).
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> [31] In considering whether privilege attaches to a particular communication, the differing underlying rationales dictate the key questions to consider. Because legal advice privilege protects the relationship of confidence between solicitor and client, the key question to consider is whether the communication is made for the purpose of seeking or providing legal advice, opinion or analysis. Because litigation privilege facilitates the adversarial process of litigation, the key question to consider is whether the communication was created for the dominant purpose of litigation, actual or contemplated.

[33] In addition, the Ontario Court of Appeal in *Ontario (AG) v. Ontario (Information and Privacy Commission, Inquiry Officer)* stated:

> What is clear now is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

[34] The Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, has made it very clear that legal advice privilege and litigation privilege are distinct, driven by different policy considerations and generate different legal consequences:

> ¶7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases - solicitor-client privilege and legal advice privilege - synonymously and interchangeably, except where otherwise indicated.

> ¶8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.
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> **...**
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> ¶26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
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> ¶27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
>
> **...**
>
> ¶33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

[35] Further, the Supreme Court of Canada has made it clear that litigation privilege is terminated once the litigation has ended:

> ¶34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> **...**
>
> ¶36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave

> rise to the privilege: *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Q.B.). See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.
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> ¶37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

[36] **3.3 Legal Advice Privilege**—The Commissioner in past orders (for example, Order 01-25[15]) has adopted the following four-element test of legal advice privilege from *B. v. Canada*:[16]

- there must be a written or oral communication,
- the communication must be of a confidential character,
- the communication must be between a client (or her or his agent) and a legal advisor, and
- the communication must be directly relating to the seeking, formulating or giving of legal advice.

[37] The records from the five claim files, discussed in detail below, relate to the direct communications between ICBC and lawyers appointed by ICBC to represent the owners of the first and third cars. These are records of internal emails sent to or from ICBC staff lawyers. In addition, ICBC withheld or severed records in the claim files relating to the Claim Appeal and Technical Committee ("Appeal Committee"). Further, ICBC applied legal advice privilege to the amount of legal fees paid and legal accounts in relation to the New Westminster and Victoria actions. ICBC also asserts the privilege in relation to one suit report that ICBC adjusters produced for ICBC staff lawyers.

[38] In the defence file (the file from the applicant's lawyer appointed by ICBC in the New Westminster action), ICBC severed or withheld records consisting of communications between the ICBC-appointed lawyer for the owner of the third car and ICBC with respect to the third car owner's defence. There is also one internal ICBC email relating to the applicant's claim against the third car owner. ICBC has withheld two suit reports under this privilege. ICBC also applied legal advice privilege to two pages in the defence file which consist of communications about the applicant's access request between ICBC and the lawyer who had been the applicant's counsel appointed by ICBC.

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[15] [2001] B.C.I.P.C.D. No. 26, at para. 60.
[16] [1995] 5 W.W.R. 374 (BCSC).

[39] ICBC argues[17] that, as these records are confidential communications containing legal advice from solicitor to client, they "fall squarely within the scope of legal advice privilege."

[40] The applicant argues[18] that ICBC "neglected and/or refused to instruct [the applicant's lawyer who had been appointed by ICBC] to fully defend my interests in the New Westminster action in an effort to protect their own interests against me in the Victoria action."

[41] The applicant[19] relies on *Chersinoff v. Allstate Insurance Co*.[20] and Order 01-46[21] for the proposition, as expressed in the Commissioner's Order at para. 9, that the "insured and the insurer were jointly represented by the law firm, until the insured later sued the insurer." The applicant quotes the *Chersinoff* case to explain the rule in respect of privilege in the case of joint retainer as:

> The result, I think, is this: communications passing between the solicitors and the insurer in regard to liability of the insured to pay damages, in regard to the amount of damages, and in regard to settlement, all of which are within the ambit of the joint employment of the solicitors, cannot be considered confidential as between the clients so such communications are not privileged vis-à-vis the plaintiff in this action and must be produced.[22]

[42] With respect to legal advice privilege, the applicant quotes, at p. 4 of her initial submission, from *Chersinoff:* "the law firm was acting for the policy holder, *i.e.,* the policy holder was a client of the firm" and "the insured and the insurer were jointly represented by the law firm." The applicant submits that she is a client of the law firm that represented her in the New Westminster action "and at the very least, I am jointly represented with ICBC by [the law firm]."

[43] ICBC states[23] that the applicant's allegation about ICBC's actions with respect to the New Westminster action is "both unfounded and entirely speculative." In addition, it states it produced a further release of records in relation to the applicant's defence from the defence file in the New Westminster action. ICBC states[24] ICBC's disclosure in this matter is consistent with the principles articulated in *Chersinoff*.

[44] The issue is the application of the joint retainer principle in the *Chersinoff* case. The applicant asserts the existence of a joint retainer with respect to the records in the defence files, as well as some of the records in the internal ICBC files.

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[17] Initial submission, para. 22, and para. 11 of August 15, 2005 submission.
[18] Initial submission, p. 1.
[19] Initial submission , p. 3, and October 5, 2005 submission at paras. 14 and 15.
[20] (1968), 69 D.L.R. (2d) 653 (BCSC) and (1969), 3D.L.R. (3d) 560 (BCCA).
[21] [2001] B.C.I.P.C.D. No. 48.
[22] (1968), 69 D.L.R. (2d) 653 (BCSC) at pp. 662-3.
[23] Reply submission, p. 1.
[24] Reply Submission, p. 2.

[45] The joint retainer concept is described by Manes and Silver[25] as: "an agent cannot assert privilege as against the principal in respect of communications made or obtained on behalf of the principal." The insurer prepared documents to assist in defence of the insured. Since the documents were prepared for the benefit of the insured, the insurer could not resist the claim for records.

[46] The crucial point for this discussion is that in *Chersinoff* the court recognized that the joint retainer continued while the insurance company was in the position of defending the policy holder. However, when the policy holder sued the insurance company for breach of the insurance policy, the joint retainer ended. The insurance company could not claim that records in the hands of the policy holder's lawyer, retained by the insurance company, were privileged until after the policy holder sued the insurance company. At that point, records were privileged. In Order 01-46, which applied this concept, the policy holder requested records from his lawyer, whom ICBC had retained to defend the applicant in an action where the third party was suing the applicant for injuries as a result of a car accident.

[47] *Hopkins (Committee of Estate) v. Wellington*[26] assists in understanding the present case. *Hopkins* is based upon disclosure to parties with a common interest, rather than joint retainer. Disclosure of privileged communications to parties having a common interest with the party asserting privilege will not defeat the privilege. In *Hopkins*, Hopkins sued Wellington in one action and Wellington sued Hopkins in another action; both actions arose from the same car accident. ICBC chose different lawyers to conduct the defence for each of the two parties in the separate actions. The question was whether the sharing of documents in such circumstances would constitute waiver of privilege. The court decided that the insurer-retained defence counsel for each party could disclose information to the client-retained counsel without waiver of privilege. The interests of each party as "plaintiff and defendant were common so that the sharing of interests would be protected by privilege."

[48] As I understand ICBC's position in this matter, it has released the records concerning the applicant's defence, both in the claim files and in the defence files, but has claimed privilege over records that involve the communications located in the ICBC claim files with lawyers (both in-house and external) about the defence of the other parties. In addition, it has claimed privilege over similar records in the defence file.

Communications with lawyers about the defence of the owners of the first and third cars in the claim files

[49] The following pages from the claim files are in dispute under this heading:

25-33, 37, 48, 60-67, 69, 82-85, 117-119, 137, 139-148, 164-176, 178, 184-185, 195-196, 205-206, 208-212, 217-220, 224-225, 239-240, 268, 296-297, 301-329, 338-339, 345, 348, 350, 684, 689-708, 732-733, 740,

[25] *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993) at p. 78.
[26] (1999), 68 B.C.L.R. (3d) 152 (BCSC).

742-751, 760, 764-766, 768-770, 774-778, 782–783, 788-789, 798-800, 807-809, 813-814, 852, 855, 858-862, 866-867, 870-871, 874, 883-885, 889-900, 904-905, 909, 918-923, 929-930, 939-940, 1097-1098, 1103-1104, 1112, 1117-1118, 1138-1139, 1165, 1188, 1197-1198, 1202-1203, 1294, 1297, 1298, 1303, 1314, 1315-1316.

[50] These pages relate to communications between counsel for the owner of the first car and ICBC and the counsel for the owner of the third car and ICBC in relation to the New Westminster action and the Victoria action.

[51] On the basis of my review of these pages, I have concluded that the records meet the test of legal advice privilege. The severed adjusters' notes (for example pp. 25-33, 37 (in part), 60-67, 69, 1294, 1297, 1298, 1314) relate to the discussion between the ICBC staff and the counsel of the first and third cars, consisting of instructions for counsel and the recording by ICBC of the reporting by counsel in order to obtain further instructions. In addition, reports created by ICBC staff include the recording by ICBC staff of opinions provided by counsel for the owners of the third car (see pp. 48 (in part) and 684 (in part)).

[52] There is correspondence between these lawyers and ICBC or, in a few cases, blind copies of correspondence from defence counsel: pp. 82-85, 117-119, 137, 139-148, 164-176, 178, 184-185, 195-196, 205-206, 208-212, 217-220, 224-225, 239-240, 268, 296-297, 301-329, 338-339, 345, 348, 350, 708, 732-733, 740, 742-751, 760, 764-766, 768-770, 774-778, 782-783, 788-789, 798-800, 807-809, 813-814, 852, 855, 858-862, 866-867, 870-871, 874, 883-885, 889-900, 904-905, 909, 918-923, 929-930, 939-940, 1097-1098, 1103-1104, 1112, 1117-1118, 1138-1139, 1165, 1188, 1197-1198, 1202-1203, 1303, 1315-1316.

[53] The content of the communications and notes of communications indicates that ICBC officials were seeking or receiving legal advice. Many of these records consist of the reporting letters from counsel for the owner of the first car or counsel for the owner of the third car.

[54] There are some records which do not appear to meet the legal advice privilege test when viewed in isolation because they do not on their face reflect the seeking or giving of legal advice. However, when placed in context, the records do demonstrate they are the necessary exchange of information leading up to the provision of advice. Examples include pp. 137, 164-167, 170, 175-176 and 345.

[55] I have considered the applicant's arguments with respect to joint retainer and common interest. I am unable to find that they apply here. There was no common interest or joint retainer with respect to the owners of the first and third cars and the applicant. In the New Westminster action, the owner of the first car is the plaintiff. The owner of the third car is one of the defendants in both actions. While the applicant and the owner of the third car are both defendants in the New Westminster action, I find no evidence that a common interest or joint retainer existed between these parties. Therefore, I find that ICBC has applied legal advice

privilege appropriately to the records with information relating to the seeking or giving of legal advice involving the counsel for the owner of the third car. Further, counsel for the owner of the third car deposes at para. 14[27] that "all communications which I or my office had with the Public Body, [name of the client] and [*in camera*] were intended to be and to remain confidential."

[56] In addition, I find that ICBC's application of legal advice privilege is appropriate with respect to seeking or giving legal advice with the counsel for the first car.

[57] It is important to recall that legal advice privilege continues even after the conclusion of the litigation. It is not lost as a result of the resolution of the New Westminster and Victoria actions.

Records of internal emails sent to or from ICBC staff lawyers in the claim files and defence file

[58] Records numbered 932, 941 and 1095 in the claim files and 1510 in the defence file are internal communications sent to ICBC staff lawyers from other ICBC staff or sent from the ICBC in-house lawyers to ICBC staff handling the claims. I find that these records are communications for the purpose of seeking or giving legal advice and were intended to be kept confidential. Therefore, they are covered by legal advice privilege.

Records relating to legal fees and invoices in the claim files

[59] These records are numbered 35, 37, 689-707, 882, 1090-1093A, 1290, 1291-2, 1295-1296, 1298, 1307-1313, 1317-1331.

[60] These records consist of invoices from counsel for the owners of the first or third cars for services rendered in the defence of the Victoria actions and from counsel for the owner of the third car in the New Westminster action. In addition, the records include the reference in the adjusters' notes of the payment of the fees to these counsel. There is reference to the defence costs of the Part 7 claim. ICBC has disclosed accounts from and payments to the ICBC-appointed solicitor for the applicant.

[61] The applicant[28] argues that as she and ICBC "were jointly represented by [the ICBC-appointed lawyer in the New Westminster action] and [the counsel for the owner of the third car] in the liability defence in the [New Westminster] action and settlement of quantum in the [New Westminister] action, the legal fees paid

[27] ICBC initial submission.
[28] October 5, 2005 submission, para. 18.

and legal accounts submitted cannot be considered confidential as between ICBC and the applicant."

[62] The Commissioner has considered the issue of the extent of the privilege in Order 03-28.[29] At para. 15 the Commissioner reviewed the leading case law and concluded:

> These cases, all of which … are binding on me, hold that the nature and terms of a legal retainer are generally privileged. The privilege extends to bills – narrative portions, itemized disbursements, time spent and amounts charged – and to composite data from which it is possible to deduce privileged information.

[63] Given the Supreme Court of Canada's decision on legal accounts in *Maranda v. Richer*,[30] I have no hesitation in saying these records are privileged.

Records entitled "Suit Report" in the claim files and the defence file

[64] These records are numbered in the claim files as p. 712 and in the defence file as pp. 135 and 1622. Doug Luther, Information Officer, ICBC, describes[31] these "suit reports":

> … they are prepared by adjusters for staff lawyers in ICBC's litigation department in order to ensure that staff lawyers have sufficient information and particulars concerning a case to assign ad hoc counsel. The suit reports contain confidential information such as reserve amounts, instructions to counsel, identification of legal issues and defence and settlement strategies.

[65] Based upon my review of these three pages, I am able to confirm the description of the suit reports is accurate. They are confidential communications with in-house counsel to aid counsel in their decision to assign a case. I am satisfied the information in the record amounts to instructions to counsel and that the necessary element of confidentiality is present.

[66] Page 712 in the claim files is ICBC's copy of the suit report. This is not the same as the suit report found in the defence file at pp. 135 and 1622. Both the record in the claims file and the records in the defence file meet the test of legal advice privilege.

Records relating to the defence of the owners of the first and third cars in the defence file

[67] These records are numbered 1499-1508, 1513 and 1526-1528 in the defence file. These records constitute communications between the law firm representing the owner of the third car and ICBC with respect to that owner's defence.

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[29] [2003] B.C.I.P.C.D. No. 28.
[30] 2003 SCR 93.
[31] August 15, 2005 submission, Affidavit #2, para. 2.

[68] The counsel retained by ICBC to defend the applicant in the New Westminster action deposed an explanation *in camera* as to how these records came to be in the defence file. How these records came to be on the file is relevant. The result is that these records were on the applicant's file held by counsel representing her. Because of the *in camera* nature of the evidence, I am not able to go further with this discussion. I conclude that the records are covered by legal advice privilege and the placement of the records on the client's file is not a waiver of the privilege. ICBC's claim for legal advice privilege for these pages succeeds.

Records in the claim files relating to the Appeal Committee concerning the applicant's request that ICBC appeal the liability ruling in the two actions

[69] This portion of the discussion covers pages in the claim files numbered: 1088-1089, 1208-1209 and 1238-1239. These records include a discussion portion of the minutes of the "ICBC Appeal Committee", an internal email from in-house counsel and the submission to the Appeal Committee.

[70] The Luther Affidavit #1 explains the background to the Appeal Committee. Luther deposes[32] that "[t]he appeal committee is established to make recommendations to the Corporation on whether or not to appeal trial decisions which are adverse to ICBC. The Appeal Committee reviews the trial judgement and receives advice from claims adjusters and trial counsel in deciding whether or not [to] appeal a trial decision." Luther further deposes in para. 12 that three of the nine members of the committee are legal counsel. In addition, one "special counsel" attended the meeting.[33]

[71] ICBC argues that the committee's process involves advice to ICBC (not the applicant) by in-house counsel on whether a trial judgement should be appealed. ICBC argues[34] the decision of whether or not to appeal a liability ruling is based upon ICBC's interests, not the interests of the applicant. ICBC argues[35] that the lawyers at the meeting "participated in giving advice on the legal question of whether a trial judgement should be appealed."

[72] The applicant[36] addresses the records relating to her request to ICBC for funding an appeal. The applicant argues[37] that she shares "the same adversity as ICBC does as the Defendant in the [New Westminster action] and as the insured of ICBC." The applicant submits[38] that

[32] ICBC initial submission, Luther Affidavit #1, para. 11.
[33] ICBC initial submission, Luther Affidavit #1, para. 12.
[34] ICBC initial submission, Luther Affidavit #1, para. 13.
[35] Initial submission, para. 20..
[36] Reply submission, paras. 23-28.
[37] Reply submission, para. 25.
[38] Reply submission, para. 28.

> [t]he records in dispute relating to the Appeal Committee are in the nature of communications passing between the solicitors retained by ICBC to provide them with legal advice and ICBC acting as my insurer in regard to liability of me, the Defendant and the insurer, to pay damages in the [New Westminster action], which falls within the ambit of the joint employment of the solicitors as held by Aikens, J. in *Chersinoff v. Allstate*. Consequently, these records cannot be considered as confidential and are not privileged vis-à-vis me, as Defendant and as the insured, in the [New Westminster action] and must be produced.

[73] In her October 5, 2005 submission,[39] the applicant submits that the facts in the minutes are "directly related to the tort actions and, more specifically, as to whether or not the ruling in the [New Westminster] action should be appealed on behalf of the applicant. The applicant states ICBC maintained conduct of the applicant's defence in the New Westminster action, including the instructions, made as a result of a vote of the committee, to abandon the appeal on behalf of the applicant. As such, the minutes are reflective of continued communications passing between solicitors and ICBC and cannot be considered confidential as between ICBC and the applicant.

[74] I do not think that the concepts of either joint retainer or common interest apply in the situation where ICBC utilizes its own in-house counsel for the purposes of advising it on a course of action with respect to whether or not to fund an appeal.

[75] I have considered *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner*). In that case, the court overturned the previous Commissioner's decision finding that legal advice privilege did not apply to minutes of a meeting between a solicitor and committee of the public body. In that case, the court relied upon the affidavit of counsel in which he deposed: "[a]t that meeting I provided legal advice on various issues that my client, the Ministry ..., raised with me."[40] Without viewing the records, the court was satisfied with the affidavit evidence.

[76] Doug Luther deposed[41] as to the lawyers' participation in the committee decision. I am persuaded by the particular nature of the committee, the type of decision it was making and the participation of counsel in the committee that legal advice privilege applies to these records.

Communications between ICBC in-house counsel and counsel for the applicant in the New Westminster action

[77] The pages covered by this description are from the defence file and are numbers 2140-2141. These two pages are correspondence from the solicitor acting in the applicant's defence in the New Westminster action to ICBC staff lawyers with respect to the applicant's request to the solicitor for records. ICBC argues[42] that the solicitor was

[39] Paras. 23-25.
[40] [1995] B.C.J. No. 2594 at para. 61.
[41] ICBC initial submission, Affidavit #1, paras. 12-24.
[42] Initial submission, para. 15.

no longer acting as defence counsel for the applicant when dealing with this matter. The solicitor deposes in an affidavit[43] that she had received three access requests from the applicant. (The applicant states there were four requests.) The solicitor states that the records in dispute related to the applicant's access request rather than her defence in the New Westminster action.

[78] The applicant[44] turns to these two pages withheld in the defence file. This communication, in the applicant's submission, had put the solicitor in "a position of direct conflict by communicating with in-house counsel at ICBC and swearing her Affidavit in support of ICBC regarding my access request." I decline to comment on these allegations other than to say that this is not the correct forum to raise these issues.

[79] The applicant[45] points out that the solicitor deposed in an affidavit attached to ICBC's initial submission at para. 5 "[t]hroughout my retainer, I received instructions from and reported to ICBC as my client." The applicant argues that the solicitor has a continuing role in the defence of any claims brought by the owner of the first car against her. She states that, at the time she made her submission, the New Westminster action was ongoing. Therefore, she continued to have a solicitor-client relationship with the solicitor.

[80] The issue is what the status of the relationship was at the time the two-page record was created.

[81] My first observation is that these records post-date the request for information that forms the basis of this review. As both parties have made submissions on these records, and in the interest of resolving this matter, I have considered these submissions and reviewed the pages.

[82] The solicitor deposes[46] that, on August 22 and 23, 2002, she received the requests and advised the applicant that she was seeking instructions from ICBC. The trial judge in this matter decided the applicant was 100% at fault for rear-ending the first car. The applicant's claims in the Victoria action against the owners of first and third car were dismissed. The applicant's appeal as defendant in the New Westminster action (where the owner of the first car was the plaintiff) was abandoned on April 12, 2002. The law firm wrote to ICBC on that day informing ICBC that it was closing its file (see p. 1175 of the disclosed records). In addition, the appeal against the owner of the first car in the applicant's action (the Victoria action) was abandoned. The issue of quantum in the New Westminster action and the appeal against the owner of the third car remained outstanding at the time of her request in August 2002. In a letter of May 24, 2002,[47] the solicitor states her understanding that the retainer was

[43] Initial submission, Defence Counsel Affidavit, para. 12.
[44] Reply submission, paras. 29-33.
[45] Reply submission, paras. 29-22.
[46] ICBC initial submission, Defence Counsel Affidavit, para. 12.
[47] Applicant's October 5, 2005 submission, Appendix "K".

with respect to the liability issues. The applicant has provided a series of letters from July 3, 2002 to April 16, 2003, sent to or from and copied to the solicitor or her law firm.[48] These letters demonstrate that the solicitor continued to act on behalf of the applicant, including during the period of time when the two-page record was created. Indeed, some of the correspondence reflects attempts by all counsel in this case to understand their respective roles.

[83] The matter is confused by the applicant's consolidated request for information made under FIPPA directed at ICBC and dated August 23, 2002, which included a request for records of the solicitor appointed by ICBC for her in the New Westminster action. The requests to the solicitor were made not under FIPPA.

[84] The two pages in dispute contain the same law firm file number as the lawyer's file on the applicant's defence in the New Westminster action. It appears that these records remained in the lawyer's file. Both the lawyer (at para. 12 of her affidavit) and Doug Luther, on behalf of ICBC (at para. 15 of his Affidavit #1), state that the lawyer was not acting as defence counsel for the applicant when dealing with this matter.

[85] In order to answer the question about the status of the lawyer at the time she received the request for information and created the two-page record, it is important to understand the nature of the relationship between the client and the lawyer, when ICBC appoints the lawyer.

[86] Underlying the applicant's submissions is the question: whom is her ICBC-appointed lawyer representing, the applicant, ICBC or both? The applicant's ICBC-appointed lawyer deposes,[49] "[t]hroughout my retainer, I received instructions from and reported to ICBC as my client". The applicant states[50] that the firm of her ICBC-appointed lawyer "has a continuing role in the defence of any claims brought by [the owner of the first car] arising from the accident…. I was and continue to be a client of [the firm of her ICBC appointed lawyer], and at the very least, a joint client, with ICBC, of [the firm]. The [owner of the first car] claim is ongoing."

[87] ICBC appointed a lawyer to defend the applicant in the New Westminster action under its contractual duty to the applicant to defend its insured from the claim of the owner of the first car.

[88] In this matter, ICBC wrote to the newly appointed lawyer for the applicant on January 12, 2000 to defend the applicant in the New Westminster action. It stated:

> This letter is the authorization for your firm to assume conduct of the defence of the above noted action in the name of the Defendant, [applicant's name]. Please be advised that [name of firm] will be acting on behalf of the Defendant, [name of the

[48] Applicant's October 5, 2005 submission, Appendices "L" to "S".
[49] ICBC initial submission, Defence Counsel Affidavit, para. 5.
[50] Reply submission, para. 29.

> owner of the third car]. Further instructions will come from the adjuster to whom a copy of this letter is being forwarded.
>
> This file is to be referred to Counsel in accordance with the Corporation's Litigation Management Strategy.

[89] In *Chersinoff*, at pp. 658-660, Aikins, J. considered *Armand v. Carr*[51] and *In Re Crocker*[52] and concluded "that the solicitors were not only solicitors for the insurer but were as well solicitors for the insured so that a solicitor-client relationship arose between the solicitors and the insured."

[90] The Commissioner pointed out in Order 01-46 that the law firm was acting for the policy-holder and that the policy-holder was the client.

[91] In *Hopkins (Committee of Estate) v*. *Wellington,* the court remarked that the privilege belonged to the client, not the insurer. The court clarified that the only client is the insured, even though the insured under the contract of insurance delegated the choice of counsel to the insurer. The lawyer owes the same duties to the client as if the lawyer had been personally retained by the client.

[92] Whether one adopts the approach suggested in *Chersinoff* or that in *Hopkins*, there is at least recognition that the applicant is the client.

[93] What was the applicant's relationship to the lawyer when she made the request for information to the lawyer and the lawyer created the two-page record? She was asking as the client in the New Westminster action, in which the appeal on the liability issue was abandoned by the time the solicitor received the request for the file but the quantum issue continued. The ongoing correspondence indicates a solicitor-client relationship continued through this period of time. In responding to the request for the file, the lawyer was still acting as her solicitor. I acknowledge that this raises difficult issues for counsel in this position. The request for records is a continuation of the solicitor-client relationship established with the applicant.

[94] In my view, the two-page record in dispute was created by the lawyer in her capacity as counsel for the applicant. Therefore, the privilege belongs to the applicant and ICBC cannot apply s. 14 to refuse her access to the record.

[95] Based upon the discussion above, I confirm ICBC's application of s. 14 to the pages listed at the beginning of this discussion in the claim files and reject it respecting pp. 2140-2141 in the defence file.

[96] **3.4 Litigation Privilege**—ICBC has claimed litigation privilege for the following pages in the claim files: 24-28.1, 30-34, 50, 52-54, 59, 64, 69, 912, 915, 1295, 1989-1996. While I have considered pp. 24-28.1, 30-33, 64, 69 and 1295 under legal

[51] [1927] 2 D.L.R. 720, [1927] SCR 348; 60 OLR 293.
[52] [1936] 2 All E.R. 899.

advice privilege above, separate portions of those pages are also under review in relation to litigation privilege. These pages are a series of separate, segregated adjuster's notes. It should be noted that ICBC has not claimed litigation privilege in respect of the records in the defence file.

[97] ICBC states[53] that, as the New Westminster and Victoria actions have been resolved, the litigation privilege is limited to the issues raised in the Part 7 action. ICBC points out the Part 7 litigation is ongoing. It was filed on July 29, 1998 and a Notice of Intention to Proceed was filed in October, 2003. It states the "Part 7 claim remained completely dormant until October, 2003."[54]

[98] Counsel for ICBC in the Part 7 litigation describes ICBC's view of the issues in the litigation in her affidavit attached to ICBC's August 15, 2005 submission (para. 7). The issues cover the nature of the applicant's disability and whether it entitles her to benefits; whether the applicant's inability to find employment relates to any injury sustained in the accident; and the amount of benefits the applicant would be entitled to for past wage loss and future wage loss if the claim were established. ICBC[55] states that the "[i]nformation concerning the applicant's injuries, ability to work and claims for past and future wage loss continues to be highly relevant to the Part 7 claim".

[99] Contrary to ICBC's assertion that the Part 7 action did not become active until October, 2003,[56] the applicant submits she has been actively seeking Part 7 benefits before and after the Part 7 action was commenced.[57]

[100] The applicant[58] argues the records in dispute to which ICBC has claimed litigation privilege are similar to those the Court of Appeal considered in *Chersinoff*. The applicant quotes *Chersinoff*[59] at p. 561 with respect to adjusters' reports and memoranda, including inter-office memoranda between employees of the defendant, in anticipation of and during litigation:

> The documents comprised in the first category were obtained or created by the insurer (the present respondent) for the purpose of opposing or settling claims made against its insured (the present appellant) arising out of the accident of August 17, 1957. The procuring and creation of these documents for that purpose were acts by the insurer done in the course of performing its contractual obligations owed by it to the insured by virtue of the insurance contract. Those obligations were performed by the insurer for and on behalf of the insured pursuant to that contractual obligation and also for its own benefit and protection because of its possible liability to indemnify its insured arising out of the same contract.

[53] August 15, 2005 submission, para. 14.
[54] August 15, 2005 submission, para. 15.
[55] August 15, 2005 submission, para. 20.
[56] August 15, 2005 submission, para. 15.
[57] October 5, 2005 submission, para. 26.
[58] October 5, 2005 submission, paras. 28-32.
[59] (1969) 3 D.L.R. (3d) 560 (B.C.C.A.).

[101] In addition, with respect to communications between the defendant in *Chersinoff* and its solicitors in anticipation and during the pendency of the action brought by the third party against the defendant, the court states at p. 562:

> In my opinion the insurer is not entitled to withhold from its insured documents prepared or acquired by the insurer for the purpose of aiding in the defence or settlement of a claim against the insured falling within the coverage of the policy. Indeed, it is bound to disclose them to the insured although they may be confidential and privileged as against other persons, especially persons adverse in interest to the insured.

[102] Therefore, the applicant argues, ICBC acquired or prepared the records in dispute as part of aiding the applicant's defence or settlement in the New Westminster action. The applicant argues that ICBC cannot now claim litigation privilege as against the applicant in the subsequent Part 7 action.

[103] In addition, the applicant argues that ICBC cannot claim privilege with respect to communications with the solicitors retained by ICBC to defend the New Westminster action, even though the records may also be relevant to the determination of ICBC's liability to indemnify the applicant.

[104] The applicant argues[60] that this situation is similar to that in Order 01-46, where the Commissioner stated at para. 11 "even if litigation privilege could be claimed by ICBC here, any such privilege had ended by the time the applicant made his request because the third party's court action against the applicant had settled." The applicant states ICBC instructed her insurer-retained counsel to file Notice of Abandonment of her appeal in the New Westminster action. This concluded that action. Thus the defence file records would lose their privilege, as the action for which they were created is terminated.[61]

[105] The applicant[62] quotes a letter from her insurer-retained solicitor in which the solicitor states that it is her understanding that the counsel for the owner of the third car would be lead counsel with respect to the quantum aspects of the applicant's interests in the New Westminster action. The applicant concludes[63] that as the counsel for the owner of the third car was negotiating the quantum issue on her behalf, pp. 1989-1996 should be released to her. Further, the applicant[64] argues that as the counsel for the owner of the third car was acting on behalf of the applicant, the applicant and ICBC were jointly represented by that counsel. Therefore, the applicant argues, the communications passing between counsel for the owner of the third car and ICBC in regard to the applicant's liability to pay damages, the amount of damages and settlement, cannot be considered confidential as between ICBC and the applicant.

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[60] Initial submission, p. 3.
[61] Initial submission, p. 4.
[62] Para 3, reply submission.
[63] Para 4, reply submission.
[64] October 5, 2005 submission at para. 20.

[106] As the Commissioner acknowledged in Order 01-53,[65] litigation privilege applies to any record or communication that comes into existence for the dominant purpose of advising on, preparing for or conducting litigation that was underway or in reasonable prospect at the time the record or communication was generated.

[107] The test for litigation privilege was articulated in *Hamalainen (Committee of) v. Sippola*[66] and *Saric v. Toronto-Dominion Bank*[67] as:

> a) was the litigation a reasonable prospect at the time the record was produced; and
>
> b) if so, what was the dominant purpose for its production.

[108] The first criterion is met if litigation was actually under way at the time the record came into existence (see Order 01-41[68]). In addition, the question of whether a record has been prepared for the dominant purpose of use in litigation turns on the particular facts of the case (*Hamalainen* cited in Order 02-08[69]).

[109] The Court of Appeal in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* discussed litigation privilege. It stated, at para. 83, the following test for determining whether litigation is "in reasonable prospect" (at para. 20) :

> In my view, litigation 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.

[110] Further, the Supreme Court of Canada has clarified that the dominant purpose test[70] should be used. The further issue arises in this matter whether the litigation in this matter was terminated when the New Westminster and Victoria actions were settled or whether the Part 7 action is related to these actions. In *Blank v. Canada (Minister of Justice)*, the Court stated:

> ¶38 As mentioned earlier, however, the privilege may retain its purpose - and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tracter Co.* (1988), 90 A.R. 323 (C.A.).

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[65] [2001] B.C.I.P.D. No. 56.
[66] (1991), 62 B.C.L.R. (2d) 254.
[67] [1999] B.C.J. No. 1712 (C.A.).
[68] [2001] B.C.I.P.D. No. 42.
[69] [2002], B.C.I.P.C.D. No. 8.
[70] *Blank v. Canada (Minister of Justice)*, see paras. 59-60.

> ¶39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
>
> ¶40 As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165). …

[111] The Part 7 action was commenced on July 29, 1998. The records in dispute for which ICBC claims litigation privilege were created after that date. However, this fact alone is not sufficient to meet the two part test.

[112] Counsel for ICBC in the Part 7 action has provided detailed *in camera* explanation of the application of litigation privilege to specific information on certain pages. There is further *in camera* argument in ICBC's August 15, 2005 submission. I am able to confirm that the information in the records for which litigation privilege is claimed falls within the description provided at para. 20 of ICBC's August 15, 2005 submission and relates to the issues described in para. 7 of the affidavit of the counsel for ICBC, attached to ICBC's August 15, 2005 submission. These issues have been described above. I am satisfied, based on this explanation, that the information in the records meets the two-part test for litigation privilege.

[113] Further, I am satisfied that the Part 7 action, even though it is a separate proceeding, as it arises from the same accident, qualifies for the extended meaning of litigation.

[114] Further explanation is required for pp. 1989-1996. The solicitor for the owner of the third car deposed[71] that pp. 1989-1996 are from his defence file. He confirms that these records were generated in contemplation of litigation.

[115] The applicant argues that pp. 1989-1996, originating in the files of the counsel for the owner of the third car, are not privileged because counsel was acting on behalf of the applicant in the quantum matter. I have considered the correspondence provided by the applicant in her October 5, 2005 submission.[72] I have read the letter dated May 24, 2002, submitted by the applicant. It indicates that her counsel (appointed by ICBC) understood that "we were retained to protect the interests of [the applicant/defendant] with respect to the liability issues … with [the counsel for the owner of the third car] to be lead counsel with respect to the quantum aspects of the Plaintiff's claim." In this respect, this letter suggests this counsel is lead counsel for the applicant/defendant on the quantum issue in relation to the New Westminster action. However, by April 16, 2003, the counsel for the owner of the third car indicates, ICBC had decided that he would not represent the applicant with respect to the quantum aspects of the New

[71] Initial submission, paras. 12-23.
[72] Appendices "K" to "S".

Westminster action. The quantum issue was severed from the trial of the liability issue by Mr. Justice Lander on March 1, 2001. The court also ordered that the liability issue be heard prior to the quantum issue. The quantum issue does not arise until the court had heard and disposed of the liability issue. Pages 1989 to 1996 were created a considerable time before the court's order of March 1, 2001. It is not clear from the records when and if in fact the lawyer for the owner of the third car acted on the quantum issue. It is clear from the content of the records that they were not created with respect to the litigation involving the owner of the third car as defendant in the New Westminster action. Rather they were created for the defence of the owner of the third party in the Victoria action where the applicant was the plaintiff. Further, the records relate to the ongoing Part 7 action. As such, they are covered by litigation privilege.

[116] This is not a matter of common interest or joint retainer, as discussed above. At the time the record was created, the applicant had commenced litigation against the third-car owner and the first-car owner. The interests of the applicant and the owner of the third car were clearly not in common; at that point they were adverse in interest.

[117] Based on the discussion above, I confirm ICBC's application of s. 14 to the pages listed at the beginning of this discussion.

[118] **3.5 Harm to ICBC's Financial Interests**—ICBC has severed reserve information on several pages under s. 17(1) of FIPPA, which authorizes ICBC to withhold information where the disclosure could reasonably be expected to harm its financial or economic interests.

[119] ICBC has applied s. 17 to the following pages in the claim files: 26, 27, 30, 53, 915 and 1294. I considered all these pages, except 1294, in the discussion above on litigation privilege. I considered p. 1294 in the discussion above on legal advice privilege. ICBC continues to assert[73] s. 17 with respect to records that are covered by litigation privilege because of a concern that disclosure of that information would reasonably be likely to harm the financial interests of ICBC in litigation.[74] ICBC states[75] that it adopts the s. 17 arguments and evidence presented in its initial submission. This is limited to a discussion on reserve information.

[120] While in the July 13, 2005 Guide to Release ICBC has used s. 17, it specifically states in its August 15, 2005 submission,[76] that it is no longer relying on s. 17 for p. 1090. I have not included this page in the s. 17 discussion. In addition, ICBC marked pp. 1989-1996 with s. 17 in its red-lined copy of its July 13, 2005 release, but did not discuss these pages in its August 15, 2005 submission. As I have considered these pp. 1989-1996 in the discussion above on litigation privilege, I have not reviewed ICBC's application of s. 17.

[73] August 15, 2005 submission, para. 25.
[74] Para. 3, August 15, 2005 submission, para. 3.
[75] August 15, 2005 submission.
[76] At para. 26.

[121] In its initial submission, ICBC refers specifically to ss. 17(1)(b) and (e), which read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[122] The Commissioner explained the nature of the harms test in s. 17 in Order 02-50.[77] In that order, the Commissioner assessed the Ministry's s. 17 claim "by considering whether there is a confident, objective basis for concluding that the disclosure" would reasonably be expected to meet the s. 17 harms. Later, in Order 04-06,[78] he adopted the language from *Lavigne v. Canada (Office of the Commissioner of Official Languages),*[79] and stated, at para. 58, that "there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged."

[123] In its initial submission, ICBC explains that s. 17 has been applied only to the reserve information in the records. It states "[r]eserve information represents the amount ICBC notionally sets aside for a claim based upon its view of the upper range of potential damages which may be necessary to settle a claim." ICBC adjusters and examiners adjust the amount as new information becomes available.[80]

[124] The only evidence ICBC presents in relation to the harm is found in Affidavit #1 from Doug Luther and an affidavit by Francesca Dawe. Doug Luther deposes at para. 28:

> ICBC has continued to claim s. 17 in relation to reserve information relating to the applicant's claim against [the owners of the first and third cars]…. ICBC considered whether or not to exercise its discretion to waive privilege with respect to reserve information but is not prepared to do so because release of this information would be harmful to the financial interests of ICBC. Disclosure of

[77] [2002] B.C.I.P.C.D. No. 51, at paras. 111-112 and 124-137.
[78] [2004] B.C.I.P.C.D. No. 6.
[79] [2002] 2 SCR 773.
[80] Initial submission, para. 31 and Dawe Affidavit, para. 5 (attached to initial submission).

> reserve information relating to the applicant's claim would reveal ICBC's view of the upper range of the claim which would provide the applicant with significant leverage in her negotiations and litigation with [ICBC].

[125] Francesca Dawe, Bodily Injury Manager, Head Office Claims, ICBC states it would meet the s. 17 test:

> …because this information reflects [ICBC's] view of the potential upper range of damages which a claim may be worth and would provide significant bargaining leverage to the party asserting the claim.

[126] In argument, ICBC makes two points. The disclosure of reserve information to the applicant would reveal the public body's defence strategy concerning litigation and/or negotiation of the claim. Further, ICBC states the information has monetary value because it would provide the applicant with confidential information concerning ICBC's view of the potential upper range of damages for her claim.

[127] The applicant submits that the reserve information is not covered by s. 17 as the court had dismissed her action in the Victoria action and found the applicant liable in the New Westminster action. She states that ICBC decided not to appeal the liability issue. The applicant concludes that ICBC has therefore taken the position that "they are no longer obliged to negotiate any sort of tort claim with me for injuries I sustained in the Accident from the [third] vehicle rear-ending my vehicle."[81]

[128] In addition, the applicant argues that if ICBC claims the reserve information still has monetary value, "then it is safe to say they had reasonably expected that they would be ordered to pay, at the very least, a portion of a tort claim forwarded by me for injuries I sustained in the Accident."

[129] Further, the applicant submits that ICBC has not shown that it "will be exposed to any more financial harm than [it] reasonably anticipated since the time of my submission to them of my claim for injuries sustained in the Accident."[82]

[130] As I have indicated in the discussion above about the litigation privilege, the Part 7 action remains extant. The question is whether the release of reserve information could reasonably be expected to reveal ICBC's defence strategy concerning the Part 7 litigation. In the circumstances of this case, the disclosure of the reserve information, generated over time, taken together, and connected to specific events or assessments, could reasonably be expected to reveal ICBC's litigation strategy. In addition, some of the amounts indicate a potential upper range of the claim, and as such, could have monetary value under s. 17(1)(b) of FIPPA. In this case, the ongoing litigation makes the harm to ICBC's financial position neither speculative nor remote.

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[81] Applicant's reply submission, para. 48.
[82] October 5, 2005 submission, para. 37.

[131] **3.6 Third-Party Privacy––**ICBC severed and withheld information under s. 22 of FIPPA, which requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's privacy. The applicant takes the position that s. 22 does not apply as the disclosure would not be an unreasonable invasion of the third party's privacy.

[132] The relevant portions of s. 22 follow:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence, …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, … .
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, … .
>
> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the

> applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

[132] As noted above, s. 57(2) of FIPPA places the burden on the applicant to "prove that the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy."

[133] Recently the Supreme Court of BC in *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*[83] discussed the approach to s. 22 cases at paras. 41 to 46. The first step is to determine if the information is personal information. Personal information is defined in Schedule 1 to FIPPA as "recorded information about an identifiable individual".

[134] The court outlined in *Nanaimo District* the approach to s. 22 at para. 44 as follows:

> The operation of s. 22(1) to (4), which come into play after first determining if the information requested is personal information of the third party, may be summarized as follows:
>
> - Section 22(1) creates a mandatory duty on the public body to refuse to disclose personal information to an access applicant if disclosure would be an unreasonable invasion of the third party's personal privacy.
>
> - Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy.
>
> - Section 22(2) requires the public body, in determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of third party personal privacy, to consider all the relevant circumstances including a series of listed ones.
>
> - Section 22(4) acts as an exclusion to subsections (1), (2) and (3), by conclusively deeming that the disclosure of personal information of certain kinds or in certain circumstances not to be an unreasonable invasion of third party personal privacy.
>
> (See Adjudication Order No. 2 (June 19, 1997), Bauman J., sitting as a Commissioner appointed under s. 60 of FIPPA, pp. 6, 7)

[135] The Commissioner has taken an approach to the analysis of s. 22 which he outlined in Order 01-53, which I follow in this case.

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[83] 2006 B.C.S.C. 131.

Applicant's submission

[136] The applicant[84] suggests that ICBC's severing has been inconsistent. She provides several examples of information that appears to be severed in one record, but released in another. In addition, she argues the transcripts of the examination for discovery of all parties to the New Westminster action are a matter of public record.

[137] The applicant[85] states:

> I am not seeking an order from the Commissioner for the release of detailed personal information of the third parties with regards to medical legal opinions, diagnosis, treatment, or ongoing evaluations. However, I am requesting the Commissioner find that ICBC is not authorized to refuse to disclose information related to the Accident. This could include, but is not limited to: claims, legal accounts and/or monies disbursed, correspondence to or from ICBC employees, notes either taken or written by various ICBC employees involved with the claims, all ICBC forms that ICBC employees are required to prepare on claim files, all complete signed and/or unsigned witness statements, and all off-site records in the possession of [name of the ICBC law firm appointed to represent the applicant in the New Westminster action].

[138] The applicant[86] adds to this list the records of the counsel for the owner of the third car with respect to the quantum aspects of the New Westminster action.

[139] The applicant refers to s. 22(2)(c) in her submissions (initial submission, p. 6 and reply submission, para. 67). I discuss this consideration below.

Submission of ICBC

[140] ICBC argues[87] that some of the records it originally withheld under s. 14 are now severed on the basis of s. 22 of FIPPA. In its August 15, 2005 submission,[88] ICBC pointed out that it was relying on s. 22 with respect to the severing of reserve information concerning the other claimant's information. ICBC points to Order 01-46, where the Commissioner concluded that it was appropriate to consider the application of s. 22 after the close of the inquiry in relation to records for which ICBC had waived its reliance on s. 14. ICBC submits that it is clear from the records that they are the personal information of the owners of the first and third cars. ICBC generally asserts the invasion of third-party privacy but, other than in the two comments below, does not specify how this privacy invasion might occur. Nor does ICBC indicate the portions of records to which presumptions under s. 22(3) may apply and how the presumptions apply to those specific portions. In many cases, s. 22 has been applied to an entire

[84] Initial submission, pp. 6-7.
[85] Initial submission, p. 8.
[86] Reply submission, para. 72.
[87] Initial submission, para. 40.
[88] Para. 26.

page, where it is obvious that s. 22 is meant to apply only to a portion of the page. An example is the print-out of the adjuster's electronic notes. I realize this is a very large request covering several thousand pages of records, but in the end the public body assesses the application of various parts of s. 22 to specific information on the page. While it is true that the applicant has the burden of proof, the Commissioner stated in Order 03-24[89] at para. 57 (citing Order 00-52[90]) that "a public body must on receiving an access request, 'satisfy itself that one or more of the presumed unreasonable invasions of privacy under s. 22(3) actually exists in the circumstances.'" Here ICBC has asserted the general application of s. 22 and left it up to the applicant to rebut the unnamed presumptions. Despite the lack of argument and direct evidence, based on my review of the contents of the records, certain presumptions may apply and are discussed below.

[141] In its reply submission, ICBC[91] provides a detailed response to the applicant's assertion that ICBC's severing was inconsistent. ICBC points out that the examination for discovery transcripts are not public records.

Application of section 22

[142] ICBC applied s. 22 to the following pages in the claim files:

> 3-4, 8, 10-11, 13-16, 18-30, 32-35, 45-52, 57-67, 102-105, 237, 314-315, 320-325, 330-337, 340-344, 346-347, 349, 351, 380, 483-484, 674, 675, 680-687, 712-713, 725, 758-759, 790, 803-804, 878-882, 887, 893-898, 901-903, 906-908, 910, 912-914, 916, 924-928, 931, 933-938, 948-1023, 1025, 1027, 1029-1034, 1038-1049, 1141, 1207, 1240, 1286-1289, 1291-1293, 1295-1298, 1302, 1336, 1339-1340, 1360-1361, 1364-1374, 1378 and 1989-1996.

[143] ICBC applied s. 22 to the following pages in the defence file:

> 2, 63-65, 135, 136, 138, 194, 199, 218-273, 304, 311, 318-346, 425, 427-807, 822, 825-826, 836, 838-840, 1293-1297, 1300, 1327-1331, 1497, 1509, 1511-1512, 1515-1521, 1523-1525, 1529, 1530, 1531, 1532-1589, 1591, 1592-1604, 1605-1615, 1616-1618, 1619-1621, 1622, 1636, 1698-1699, 1818, 1837 and 1970-1971.

[144] ICBC applied s. 22 to several pages where it also applied s. 14. I have not reviewed the s. 22 application to the following pages where I have accepted that ICBC properly applied s. 14 to the entire record: 314-315, 320-325, 712, 882, 893-898 and 1989-1996 in the claim files and pp. 135 and 1622 in the defence file. In addition, as I have accepted that ICBC properly applied ss. 14 and 17 to p. 1294 in the claim files, I have not reviewed the s. 22 application to that page.

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[89] [2003] B.C.I.P.C.D. No. 24.
[90] [2000] B.C.I.P.C.D. No. 56.
[91] Reply submission, p. 5.

[145] The first step in the analysis is to identify the respective personal information of the applicant and the third party. The information severed or withheld under s. 22 does not include information about the applicant, but s. 22 is the personal information of the owner of the first car or third car.

[146] The type of information includes the address, details about the parties' insurance coverage, driver's licence number, amounts paid to the other parties, background information used in reports by counsel to ICBC about examination for discovery, impressions of the parties during the examination for discovery, medical condition of the other parties as a result of the accident, copies of correspondence between the lawyer for the third car owner's lawyer and the first car owner's lawyer which had been copied to ICBC, details of previous claims, a form entitled Head Office Claims Referral Report about the other parties' injuries and ongoing medical conditions and treatments (including an Independent Medical Examination), details about the ongoing bodily injury claims, correspondence between ICBC and health care professionals for one of the owners and correspondence between ICBC and one of the claimants about the claim.

Deemed not to be an unreasonable invasion of privacy

[147] The parties have not addressed s. 22(4) of FIPPA. I conclude, after a careful review of the withheld and severed records, that they contain no information that relates to the position, functions or remuneration of public body employees (s. 22(4)(e)) and any other portions of s. 22(4). Therefore s. 22(4) does not apply to any of the information in dispute.

Unreasonable invasion of personal privacy

[148] Section 22(3) of FIPPA sets out a number of presumptions that may be rebutted by circumstances. I will discuss the portions relevant to the specific category of records. For clarity, I have discussed the application of various parts of s. 22(3) under various classes of personal information described below. I have included a brief discussion of s. 22(2) for each of the categories of records, but a fuller discussion of s. 22(2) follows this portion. The discussion below covers all the personal information to which ICBC has applied s. 22.

Medical information

[149] The applicant states she does not seek access to "medical legal opinions, diagnosis, treatment, or ongoing evaluations". In the case of one of the third-party claims, there is medical information included as part of the evaluation of the claim. This includes prescriptions, reports (including medical legal reports), description of the injuries and treatments, medical history, correspondence between ICBC and health professionals, payments for medical expenses, and payments for producing various medical reports or chart reviews. This type of information clearly falls under the presumed unreasonable invasion of personal privacy expressed in s. 22(3)(a) of FIPPA.

I do not find that any relevant circumstances under s. 22(2) favour disclosure. Therefore, I find that ICBC is required to withhold all the above noted medical information.

Employment and educational information

[150] ICBC has withheld third-party employment-related information. Some of the records include information about a third-party's current and past employment, details about the nature of the employment and the working hours, name of the employer, and further details of the employment (including earned and lost income). I include under this heading calculations of lost wages and the amounts of the advances on the claim for lost wages. In addition, the records contain the educational history of one of the third-party claimants. The information withheld by ICBC is subject to the presumed invasion of personal privacy created by s. 22(3)(d) of FIPPA. The applicant has not attempted to rebut this specific presumption, other than by her general assertion that she is entitled to the information. The circumstances in s. 22(2) do not support disclosure of the personal information. I find that ICBC is required to refuse access to the third parties' employment and education related information.

Financial information

[151] Much of the information in the records withheld under s. 22 falls under the presumed invasion of privacy created by s. 22(3)(f). This financial information consists of the details of the third parties' insurance coverage and previous claims.

[152] Details of the insurance are personal information of the third party. In this case the detail includes the insurance rate, policy details and use of the car. It also includes details about the investigation of the third-party claim, such as the claim exposure summary. As this information is about the third parties' finances or financial history, it is subject to the presumption created by s. 22(3)(f). I am unable to see any relevant circumstances under s. 22(2) that rebut this presumption. I find that ICBC is required to refuse to disclose financial information of the third parties.

[153] In its August 15, 2005 submission, although ICBC states at para. 26 that it has withdrawn its reliance on s. 17 on certain pages, ICBC continues to withhold or sever some of the information on these pages under s. 22 of FIPPA. I have reviewed the application of s. 22 to the reserve information on portions of pages 13, 19, 22, 34, 47, 683, 686 and 1292 in the claim files and portions of pages 1525 and 1529 in the defence file. The Commissioner has considered the application of s. 22 to reserves in Order 01-46[92]:

> I do not agree that ICBC is required by s. 22(1) to withhold any dollar amounts set out under "reserves" for the claim. Nothing in the material before me supports the view that the amount of a reserve taken by an ICBC adjuster respecting the third party's claim is personal information of the third party. ICBC has not shown how

[92] Para. 43.

> the reserve information, on its own, could disclose the nature or amount of any insurance maintained by the third party or how it could consist of, or disclose, other personal information. I find that ICBC is not required to refuse to disclose this information under s. 22(1).

[154] ICBC has not provided any support of its view that it is required to withhold the dollar amounts of the reserves for the third-party claims. Therefore, I find ICBC is not required to refuse disclosure of this information under s. 22(1).

[155] I have also reviewed the information about the costs of vehicle repair, the valuation of vehicles and the salvage information. In my opinion, this information is akin to the vehicle number discussed by the Commissioner in Order 01-46 at para. 46:

> ICBC withheld the registration number and serial number of the third party's motor vehicle under s. 22(1). These are not, to my mind, the third party's personal information within the meaning of the Act. Unlike the business telephone number and address of the third party's employer – which lead to disclosure of the employer and thus are about the third party's employment history – this information is not "about" the third party. These numbers are identifiers assigned to the vehicle, not the owner. They are information "about" a vehicle, not its owner.

[156] The information about the cost of car rental, amount of a "total loss settlement", the valuation of the loss on pages 1022–1023, 1025, 1029–1034, 1288, 1360, 1361, 1364, 1365–1374 in the claim files and on pages 1592-1604 of the defence file, is about the vehicle and not about the individual. As such, s. 22(1) does not apply to the information. However, I have severed personal information on those pages including address information, amount of deductible and banking information.

Claims processing information and third party contact information

[157] Much of the information withheld from the applicant that is not covered above relates to the general processing of the third parties' claims. These records include the correspondence about actions taken by ICBC on the claims file and name contact information such as phone number and driver's license number.[93] Where the information relates to financial history, it is covered by the presumption under s. 22(3)(f). Some of the other processing information may, however, not directly relate to financial history, but disclosure of this information would be an unreasonable invasion of a third party's personal information under s. 22(1). There are no relevant circumstances under s. 22(2) that apply to this information. Therefore, I find ICBC was required to withhold this information.

Personal evaluations

[158] There are several examples where ICBC has withheld personal information about the third parties under s. 22 where counsel have provided comments and observations to ICBC about the third parties' demeanour and evaluated an individual's

[93] See Order 00-42, [2000] B.C.I.P.C.D. No. 46, p. 31.

abilities as a witness, in preparation for trial. These comments are often in the context of a post Examination for Discovery reporting letter. ICBC released similar information about the applicant in its response. However, the evaluative information about the third party is clearly the third party's personal information. While the s. 22(3)(g) presumption includes "personal evaluations", this is usually considered in the human resources context. Past orders have interpreted this section as referring, for example, to formal performance reviews, to job or academic references or to comments and views of investigators about a complainant's or respondent's workplace performance and behaviour in the context of a complaint investigation. See, for example, Order F05-02,[94] at paras. 57-59, and Order 01-53, at paras. 42-47.

[159] In this particular context and given the evaluative nature of the comments, this information falls within the presumption. There are no relevant circumstances under s. 22(2) that apply to this information. Therefore, I find ICBC was required to withhold this information.

Relevant circumstances

[160] The parties discussed ss. 22(2)(c) and 22(2)(f). Section 22(2)(c) states that a relevant consideration is whether the information is relevant to a fair determination of rights. The Commissioner discussed s. 22(2)(c) in Order 01-07,[95] at paras. 31-32:

> In Ontario Order P-651, [1994] O.I.P.C. No. 104, the equivalent of s. 22(2)(c) was held to apply only where *all* of the following circumstances exist:
>
> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
>
> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.
>
> I agree with this formulation. I also note that, in *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.), at paras. 85-89, Lynn Smith J. concluded that a complainant's "fairness" concerns, related to the conduct of a complaint investigation, did not activate s. 22(2)(c).

[94] [2005] B.C.I.P.C.D. No. 2.
[95] [2001] B.C.I.P.C.D. No. 7.

[161] Although the applicant quotes s. 22(2)(c), she does not elaborate on why this consideration should be taken into account. Her reliance on s. 22(2)(c) flows from her discussion on the nature of her claim that ICBC failed to instruct her ICBC-appointed lawyer "to fully defend [her] interests in the New Westminster action in an effort to protect their own interests against [her] in the Victoria action"[96]. The applicant states that she requires access to the records "in order for me to make a fair determination that [her] rights have not been violated."[97]

[162] ICBC states[98] that the applicant's submission in the above paragraph "is both unfounded and entirely speculative". Further, ICBC submits, it has provided the applicant with "access to the records between ICBC and [the applicant's ICBC appointed lawyer] in relation to [her] defence… ." My review of the information withheld on the basis of s. 22 confirms that there is nothing in those records that would advance the applicant's efforts in seeking a fair determination of her rights.

[163] The applicant states[99] that it is her belief that "ICBC has been using [the ICBC- appointed lawyer for the owner of the third car] to negotiate settlement of the quantum aspect of the [New Westminster action]." The applicant argues access to the third-party personal information would show the involvement of this counsel in such negotiations.

[164] As I understand the applicant's position on this point, she wishes access to the third parties' personal information in order to determine whether her ICBC-appointed lawyer has fully defended her position. I do not believe that the fair determination of rights envisioned by s. 22(2)(c) includes this type of post-trial re-examination of professional conduct. As a general proposition, I do not find that s. 22(2)(c) assists the applicant as a consideration under s. 22(2).

[165] ICBC also appears to be making an argument for a s. 22(2)(f) claim, in that the personal information was supplied either by it to the third parties' counsel or to it by the third parties or their counsel in confidence. This claim has been made in relation to its position with respect to its s. 14 discussion above. Legal counsel for the third-party driver of the third car deposes that all communications with ICBC and his client "were intended to be and to remain confidential".[100] As some of the records are considered under both sections, it is reasonable to consider this consideration here. I have kept the relevant circumstance of s. 22(2)(f) in mind to assess the s. 22 issues above.

Third-party correspondence between legal counsel for the other parties

[166] ICBC has applied s. 22 to the ongoing correspondence between the third parties' lawyers which is contained in each of the third parties' claim files. This is the usual back and forth during the preparation for litigation, such as the setting of dates for various

[96] Initial submission, p. 1.
[97] Initial submission, p. 2.
[98] Reply submission, p. 1.
[99] Reply submission, para. 4.
[100] Initial submission, Vos Affidavit, para. 14

events such as trials. While this information may appear to be fairly routine, it is the third parties' personal information. The applicant has said she is interested in a specified set of records (see above) and the records in this class generally would not fall within those specifications (and therefore there is no reason to discuss them). However, in order to be comprehensive, I have chosen to include them in the discussion. Other than the s. 22(2)(c) argument, the applicant has not advanced any relevant consideration under s. 22 in favour of release. The third parties, in my opinion, are entitled to the privacy protection required by s. 22(1), even where the presumptions and the relevant considerations do not apply. Therefore, I find the applicant has not met her burden and ICBC has correctly applied s. 22(1) to the records of the correspondence between the third parties' counsel.

Transcripts of the Examination for Discovery

[167] The applicant argues that the transcripts of the examination for discovery of all parties to the New Westminster action are a matter of public record. The applicant[101] points out that ICBC has released the transcripts of the examination for discovery of the owner of the first car, but it has not released the transcripts of the discovery the owner of the third car.

[168] ICBC[102] submits that the examination for discovery transcripts are not public records. While portions of the examination may be read in during trial, the record, apart from its limited trial use, is not available for public access. In addition, there are strict rules governing the use which may be made of records and information obtained during pre-trial discovery. ICBC states "[t]he fact that the applicant has access to personal information during the litigation does not entitle her to the same or similar personal information which is otherwise protected under s. 22 of the Act." ICBC states that the examination for discovery transcripts of the owner of the first car were released to the applicant by the applicant's ICBC-appointed counsel in the litigation process.

[169] ICBC may be referring to the case law with respect to implied undertaking. *Hunt v. Atlas Turner Inc.*[103] established that there is an obligation on a party obtaining the production of documents to keep the records confidential and not to use them for any purpose outside of the action in which they are produced. In *Discovery Enterprises Inc. v. Ebco Industries Ltd.*,[104] the court recognized that "[d]iscovery constitutes a very serious invasion of privacy and confidentiality of a litigant's affairs." It is not correct to assume, as the applicant has done, that the records released to her through the discovery process of the trial are public records. I recognize that a record placed in the court registry is subject to Rule 64(1) of the Supreme Court Rules, which provides access, on the payment of the proper fees, to a copy of a document on file in a proceeding. However, in this case there is no evidence that the records are in the court registry.

[101] Reply submission, para.71.
[102] Reply submission, p. 5.
[103] [1995] B.C.J. No. 758 (C.A.).
[104] [1998] B.C.J. No. 183 (S.C.).

[170] An application for information under FIPPA has a particular quality. Unlike records disclosed in the court process, records disclosed under FIPPA do not carry the restrictions on the future use or distribution of information. In *Children's Lawyer for Ontario v. Goodis*,[105] the Ontario Court of Appeal at para. 51 recognized that the requester is not seeking private access but access for the public.

[171] In this case, the information severed or withheld from the transcripts consists of the third parties' personal information such as date of birth, employment history, family events and financial information. This information is protected by ss. 22(3)(d) and (f) and I do not consider s. 22(2)(c) to be a relevant consideration. Therefore, I find ICBC has correctly applied s. 22(1) to these records.

[172] **3.7 Advice or Recommendations**—ICBC applied s. 13 to pp. 45-49, 681-685, 1088-1089, 1208-1209 and 1238-1239 in its 2003 disclosure. ICBC reconsidered pp. 45-49 and 681-685 in July and August 2005 and the resulting decision did not apply s. 13.

[173] I considered pp. 1088-1089, 1208-1209 and 1238-1239 in the above discussion on s. 14 and records about the Appeal Committee. As I found s. 14 was properly applied, there is no need to address these pages under s. 13.

[174] **3.8 Duty to Assist**—In her initial submission,[106] the applicant questioned whether ICBC had responded to the applicant in an open, accurate and complete manner. The applicant pointed out several instances of what appeared to be inconsistent severing.

[175] ICBC responded in its reply submission that it "faced a challenge in this case because of the numerous requests and because the applicant wore two hats as both plaintiff and defendant in the two actions." ICBC has reconsidered its position in this inquiry on two occasions, releasing more information in each case.

[176] In response to the allegations of inconsistencies in the severing of information, ICBC was able to confirm that there were two cases of such inconsistencies, where a small amount of information severed in one record was released in another record.

[177] While I appreciate the applicant's frustration with the process, human error is certainly possible, particularly in a case where there is a large volume of overlapping records from a number of files.

[178] Given the circumstances of this case, and the subsequent releases, I am not prepared to find there was a breach of s. 6 of FIPPA.

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[105] [2004] O.J. No. 965.
[106] Page 8.

4.0 CONCLUSION

[179] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to para. 2 below, I find that ICBC is authorized by ss. 14 and 17(1) to refuse the applicant access to information it withheld under those sections.

2. I find that ICBC is not authorized by s. 14 to refuse the applicant access to the information it withheld under that section on pages 2140-2141 in the defence file.

3. Subject to para. 4 below, I find that ICBC is required by s. 22 to refuse the applicant access to the information withheld under s. 22.

4. I find ICBC is not required by s. 22 to refuse the applicant access to the information it withheld under that section as shown by the pink highlighting on the copy provided to ICBC, on pages 13, 19, 22, 34, 47, 683, 686, 1022-1023, 1025, 1029-1034, 1288, 1292, 1360, 1361, 1364, 1365-1374 of the claim files and pages 1525, 1529 and 1592-1604 of the defence file. I require ICBC to disclose this information to the applicant.

5. No order is necessary regarding ss. 6 and 13.

October 10, 2006

ORIGINAL SIGNED BY

Bill Trott
Adjudicator

OIPC File No. F02-16504

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Page	*Date of Guide to Release*[107]	*W*[108]	*S*[109]	Sections of Act Applied by ICBC revised after Aug. 2005 release	14	17	22
3-4			X	22			X
8			X	22			X
10-11			X	22			X
13			X	22			X portion; ✓ release portion
14-16			X	22			X
18			X	22			X
19			X	22			X portion; ✓ release portion
20-21			X	22			X
22			X	22			X portion; ✓ release portion
23			X	22			X
24-25			X	14, 22	X		X
26-27			X	14, 17, 22	X	X	
28-29			X	14, 22	X		X
30			X	14, 17, 22	X		
31			X	14	X	X	
32-33	Aug. 2005		X	14, 22	X		X
34	Aug. 2005		X	14, 22	X		X portion; ✓ release portion
35			X	14, 22	X		X
37			X	14	X		
45-46	July 2005		X	22			X
47	July 2005		X	22			X portion; ✓ release portion
48	July 2005		X	14, 22	X		X
49	July 2005		X	22			X
50	July 2005		X	14, 22	X		X
51	July 2005		X	22			X
52	July 2005		X	14, 22	X		X
53	July 2005		X	14, 17	X	X	

[107] If column is not complete, the records reviewed are as provided in the Guide to Release in ICBC's initial submission, Exhibit F, attached to Luther Affidavit #1.
[108] Withheld
[109] Sever

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Page	*Date of Guide to Release*[107]	*W*[108]	*S*[109]	Sections of Act Applied by ICBC revised after Aug. 2005 release	14	17	22
54	July 2005		X	14	X		
57			X	22			X
58			X	22			X
59			X	14, 22	X		X
60-63			X	14, 22	X		X
64			X	14, 22	X		X
65-67			X	14, 22	X		X
69			X	14	X		
82-85		X		14	X		
102-105			X	22			X
117-119		X		14	X		
137		X		14	X		
139-148		X		14	X		
164 - 176		X		14	X		
178		X		14	X		
184-185		X		14	X		
195-196		X		14	X		
205-206		X		14	X		
208-212		X		14	X		
217-220		X		14	X		
224-225		X		14	X		
237			X	22			X
239-240		X		14	X		
268		X		14	X		
296-297		X		14	X		
301-313		X		14	X		
314-315		X		14, 22	X		Not reviewed
316-319		X		14	X		
320-325		X		14, 22	X		Not reviewed
326-329		X		14	X		
330-337		X		22			X
338-339		X		14	X		

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Page	*Date of Guide to Release*[107]	*W*[108]	*S*[109]	Sections of Act Applied by ICBC revised after Aug. 2005 release	14	17	22
340-344		X		22			X
345		X		14	X		
346-347		X		22			X
348		X		14	X		
349		X		22			X
350		X		14	X		
351			X	22			X
380			X	22			X
483-484		X		22			X
674			X	22			X
675			X	22			X
680			X	22			X
681-682	July 2005		X	22			X
683	July 2005	X		22			X portion; ✓ release portion
684	July 2005		X	14, 22	X		X
685	July 2005		X	22			X
686		X		22			X portion; ✓ release portion
687		X		22			X
689-708		X		14	X		
712		X		14, 22	X		Not reviewed
713		X		22			X
725			X	22			X
732-733		X		14	X		
740		X		14	X		
742-751		X		14	X		
758-759		X		22			X
760		X		14	X		
764-766		X		14	X		
768-770		X		14	X		
774-778		X		14	X		
782-783		X		14	X		
788-789		X		14	X		

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Page	*Date of Guide to Release*[107]	*W*[108]	*S*[109]	Sections of Act Applied by ICBC revised after Aug. 2005 release	14	17	22
790		X		22			X
798-800		X		14	X		
803-804		X		22			X
807-809		X		14	X		
813-814		X		14	X		
852		X		14	X		
855	July 2005	X		14	X		
858-862		X		14	X		
866-867		X		14	X		
870-871		X		14	X		
874	July 2005	X		14	X		
878-879		X		22			X
880	July 2005		X	22			X
881			X	22	X		X
882	Aug. 2005	X		14, 22	X		Not reviewed
883-885		X		14	X		
887		X		22			X
889-892		X		14	X		
893-898		X		14, 22	X		Not reviewed
899-900		X		14	X		
901-902		X		22			X
903		X		22			X
904-905		X		14	X		
906		X		22			X
907		X		22			X
908		X		22			X
909		X		14	X		
910			X	22			X
912	July 2005		X	14, 22	X		
913		X		22			X
914			X	22			X
915	July 2005		X	14, 17	X	X	

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Page	*Date of Guide to Release*[107]	*W*[108]	*S*[109]	Sections of Act Applied by ICBC revised after Aug. 2005 release	14	17	22
916			X	22			X
918-923		X		14	X		
924-928		X		22			X
929-930		X		14	X		
931		X		22			X
932		X		14	X		
933		X		22			X
934-938		X		22			X
939-941		X		14	X		
948-952		X		22			X
953-979		X		22			X
980-981		X		22			X
982-1020		X		22			X
1021		X		22			X
1022		X		22			✓ release
1023		X		22			X portion; ✓ release portion
1025		X		22			X portion; ✓ release portion
1027			X	22			X
1029 -1034		X		22			✓ release
1038-1042		X		22			X
1043			X	22			X
1044-1049		X		22			X
1088-1089			X	13, 14	X		
1090-1093A	July 2005		X	14	X		
1095			X	14	X		
1097-1098		X		14	X		
1103-1104		X		14	X		
1112		X		14	X		
1117-1118		X		14	X		
1138-1139		X		14	X		
1141			X	22			X
1165		X		14	X		

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Page	***Date of Guide to Release*[107]**	***W*[108]**	***S*[109]**	**Sections of Act Applied by ICBC revised after Aug. 2005 release**	**14**	**17**	**22**
1188		X		14	X		
1197-1198		X		14	X		
1202-1203		X		14	X		
1207			X	22			X
1208-1209		X		13, 14	X		
1238-1239		X		13, 14	X		
1240			X	22			X
1286-1287			X	22			X
1288			X	22			✓ release
1289			X	22			X
1290	Aug. 2005		X	14	X		
1291	July 2005		X	14, 22	X		X
1292	July 2005		X	14, 22	X		X portion; ✓ release portion
1293	July 2005		X	22			X
1294			X	14, 17, 22	X	x	Not reviewed
1295-1298	July 2005		X	14, 22	X		X
1302			X	22			X
1303		X		14	X		
1307-1313		X		14	X		
1314			X	14	X		
1315-1316		X		14	X		
1317-1331		X		14	X		
1336	Aug. 2005		X	22			X
1339-1340		X		22			X
1360-1361		X		22			X portion; ✓ release portion
1364-1374		X		22			✓ release
1378			X	22			X
1989-1996	July 2005	X		14, 17, 22	X	Not Reviewed	Not reviewed

☑ - indicates release by Order **X** - indicates withheld by Order

Page	*Date of Guide to Release*[110]	*W*[111]	*S*[112]	Sections of Act Applied by ICBC	14	22
2			X	22		X
63-65		X		22		X
135		X		14, 22	X	Not Reviewed
136		X		22		X
138			X	22		X
194			X	22		X
199			X	22		X
218-273		X		22		X
304			X	22		X
311		X		22		X
318-346		X		22		X
425			X	22		X
427-807		X		22		X
822			X	22		X
825-826			X	22		X
836			X	22		X
838-840			X	22		X
1293-1297			X	22		X
1300			X	22		X
1327-1331			X	22		X
1497		X		22		X
1499-1508		X		14	X	
1509		X		22		X
1510		X		14	X	

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[111] Withheld
[112] Sever

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Page	*Date of Guide to Release*	*W*	*S*	Sections of Act Applied by ICBC	14	22
1511-1512		X		22		X
1513		X		14	X	
1515-1521		X		22		X
1523-1524		X		22		X
1525		X		22		X portion; ✓ release portion
1526-1528		X		14	X	
1529	Aug. 2005		X	22		X portion; ✓ release portion
1530		X		22		X
1531			X	22		X
1532-1589		X		22		X
1591			X	22		X
1592-1604		X		22		✓ release
1605-1615		X		22		X
1616-1618		X		22		X
1619-1621		X		22		X
1622		X		14, 22	X	X
1636			X	22		X
1698-1699		X		22		X
1818		X		22		X
1837		X		22		X
1970-1971		X		22		X
2140-2141		X		14	✓ release	