



A Cautionary Tale on Privilege Claims by Court-Appointed Receivers

By John A. MacDonald and Mary Paterson¹

In *Manufacturers Life v. Juno Developments*, 2011 ONSC 3945, the Court considered whether Court-appointed receivers can claim solicitor-client or litigation privilege to protect documents. The Court permitted the Receiver to claim solicitor-client privilege, holding that receivers benefit from the same protection as anyone else. The Court held that this protection applies even where the receiver and appointing creditor jointly retain the same counsel. However, the Court did not permit the Receiver to broadly assert litigation privilege, holding that claims of litigation privilege must be carefully scrutinized. As a result, receivers and their counsel will be required to establish a strong evidentiary record to support claims for litigation privilege, including a careful consideration of the applicable legal principles.

The Dispute

The mortgagee (“Manulife”) appointed a private receiver that was converted to a Court-appointed interim receiver (the “Receiver”) over the property owned by the debtor (“Juno”). Juno found a purchaser for the property but the Receiver did not pursue that opportunity in the way Juno would have liked. Adversarial proceedings ensued.

Leading up to the hearing for passing the Receiver’s accounts, Juno asked for all documents in the Receiver’s possession so that Juno could develop its notice of objections. The Receiver delivered 15,000 documents to Juno but claimed solicitor-client and/or litigation privilege over 580 documents. Juno brought a motion requesting disclosure of these documents.

Receivers Are Protected by Solicitor-Client Privilege

The Court allowed the Receiver to claim solicitor-client privilege, holding that receivers who jointly retain counsel with the secured creditor who sought their appointment can claim solicitor-client privilege over documents and can refuse to disclose those documents to other stakeholders.

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Generally, solicitor-client privilege protects confidential communications between the lawyer and client where the client seeks legal advice. Juno argued that the Receiver could not claim solicitor-client privilege for two reasons: (i) the communications were not confidential because the Receiver shared its legal advice with Manulife because they jointly retained counsel; and (ii) as a Court-appointed officer, the Receiver had a duty to treat all interested persons equally and had to disclose to Juno information that was disclosed to Manulife.

The Court rejected these arguments. First, the Court said that although the parties to a joint retainer must share all information and communications with each other, that information is confidential vis-a-vis any person who is not party to the joint retainer. Although the Court discouraged secured creditors and Court-appointed receivers from jointly retaining counsel, the Court upheld the solicitor-client privilege associated with such retainers.

Second, the Court held that although receivers owe fiduciary obligations to interested parties, the interested parties do not have the right to penetrate solicitor-client privilege. Receivers have the same right to seek confidential legal advice as anyone else and can assert solicitor-client privilege over communications with their counsel.

Claims for Litigation Privilege Are Carefully Scrutinized

On the other hand, the Court carefully considered the Receiver's assertion of litigation privilege over various types of documents and rejected most of its claim. The decision shows how carefully receivers and their counsel must substantiate claims of litigation privilege.

Generally, litigation privilege applies to documents created for the dominant purpose of litigation and the privilege ends when the litigation ends. Litigation privilege exists to allow litigants to prepare for litigation without fear that their strategy will be prematurely disclosed. Juno argued that Court-appointed receivers should never be able to assert litigation privilege to withhold documents from stakeholders. The Court rejected this argument in principle, but then analysed and rejected most of the litigation privilege claims on the facts of the case.

First, the Court observed that everything a Court-appointed receiver does is within "an overarching framework" of litigation between the creditor and debtor. However, this context does not cloak everything receivers do in litigation privilege. Instead, the Court focussed on the test for litigation privilege, which is whether the documents were prepared for the dominant purpose of litigation. As a result, the Court held that the Receiver could not claim litigation privilege over documents relating to its ongoing obligations to manage the assets. This makes sense: receivers arguably do not create such documents for the dominant purpose of a litigation in which they are an adverse party but rather for the dominant purpose of completing their mandate.

The difficulty arises when a stakeholder challenges the receiver's management of the estate such that the receiver and stakeholder are in an adversarial position. For example, in *Manufacturers Life v Juno*, the dispute between the Receiver and Juno regarding how the Receiver conducted the sale started before the sale and was likely to be a material issue at the passing of accounts hearing. The sale may have been complete, but the dispute was not. It is possible that the Receiver created documents for the dominant purpose of the dispute between the Receiver and Juno that ought to have been protected by litigation privilege. However, the Receiver

“conflate[d] solicitor-client privilege with litigation privilege” and did not satisfy the Court that its claims of litigation privilege related to the adversarial positions taken by the parties in a continuing dispute. As a result, the Court held that most of the documents were not litigation privileged.

What Receivers Can Do to Protect Privilege Claims

Receivers and their counsel can take some valuable strategies from this case. First, the case demonstrates the Court’s deference to solicitor-client privilege and its heightened scrutiny of litigation privilege. Receivers will likely have greater success relying on solicitor-client privilege and should, where possible, put arrangements in place to claim solicitor-client privilege. For example, communications relating to legal advice must be treated as confidential and should not be shared with others as that might waive privilege.

Second, if a Receiver advances a claim for litigation privilege, it must provide a strong evidentiary basis explaining that the dispute for which the document was created – and therefore the rationale for litigation privilege – is ongoing. For example, in *Manufacturers Life v. Juno*, the sale was complete, but the dispute about it was not and the privilege related to the dispute arguably survived the closing of the transaction. The Receiver should also separate its claims for solicitor-client and litigation privilege and provide detailed evidence justifying each claim.

Two Notes of Caution

This case illustrates that Courts will rigorously examine claims for litigation privilege. It is also a case that must be carefully considered by counsel seeking to rely on it because the decision contains statements that can be taken out of context. For example, the Court states, “A receiver’s litigation privilege must have a much narrower scope”. However, it is clear from reading the decision that the test for litigation privilege is the same for a receiver as for any other litigant, and the Court’s comment notes that a receiver’s assertion of litigation privilege must be based on more than merely the existence of the proceeding between the debtor and creditor. Each claim for privilege is fact-specific and counsel must give the Court the underlying facts it needs to accept the privilege claim.

Second, as a practice note for receivers and their counsel, the Court made its displeasure about the delay in this case very clear, saying: “I am especially displeased that matters involving a Court-appointed officer – a receiver – have dragged on for so long”. The Court also said, “receivers are not powerless in the face of opposing positions which they may think are ill-founded” and “a court-appointed receiver must act with reasonable dispatch to complete the administration of its mandate”. These comments are a reminder that the Courts expect Court-appointed officers to diligently complete their mandates and to not get unnecessarily bogged down in adversarial proceedings.