LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

THE CONFIDENTIALITY OF EXPERT MEDICAL REPORTS CHALLENGED BY THE *COMMISSION D'ACCÈS À L'INFORMATION*

In one of the very first decisions rendered pursuant to the *Act Respecting the Protection of Personal Information in the Private Sector ("Personal Information Act"), the Quebec Access to Information Commission* (the "Commission") ruled that individuals were generally entitled to have access to their expert medical reports which had been prepared at an employer's request.

This decision in X vs. Dow Chemical Canada Inc.[1] is likely to have serious repercussions not only in the labour relations field but in the insurance field. A motion for leave to appeal this decision was recently filed and should be heard by the Court of Quebec[2] in the not-too-distant future.

Nevertheless, we believe that it is imperative to comment at this time on this case law which underscores the importance of taking the Personal Information Act into consideration in business management and the very strict attitude adopted by the court responsible for its interpretation and application.

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THE FACTS AS REPORTED IN THE DECISION

On January 12, 1994, just a few days after the *Personal information Act* [3] came into force, an employee who had apparently been on sick leave for

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a few years sent his employer, Dow Chemical, a written request to obtain a copy of his expert medical report which had been prepared in April 1992. The company in question acknowledged receipt of his request but did not provide the documents within the 30-day delay prescribed by law and did not formally justify its refusal.

On or about the following February 11th, the employee contacted his employer's external solicitors and reiterated his request. It seems as though he would have spoken with the secretary of the attorney in charge of his file and she would have asked him to send his regular physician's name so that she could forward the medical report in question.

On the following February 17th, as requested, the employee sent his regular physician's name and address to the solicitors. He took advantage of this opportunity to ask them for the most recent expert medical reports prepared at his employer's request on February 14 and 15, 1994.

As both requests for access went unanswered, the employee asked the Commission to rule on the dispute.

For a clear understanding of the matter, it must be pointed out that the employee had asked to be reinstated on January 31, 1994, that on the following February 7th, he lodged an initial complaint against Dow Chemical for unjust dismissal and, on February 10th, he had been asked to undergo medical examinations by the employer's experts. Finally, on April 7, 1994, the employee was dismissed as a result of an administrative measure and, a few days later, lodged a new dismissal complaint with the Labour Standards Commission .

THE ARGUMENTS INVOKED BY THE COMPANY

During the hearing before the Commission, the company adduced several reasons to justify its refusal to convey the requested documents. To begin with, Dow Chemical argued that the medical reports in dispute were protected by solicitor-client privilege given the fact that they had all been addressed to the company's solicitors.

Secondly, Dow Chemical argued that the requested reports were covered by Sub-section 39 (2) of the *Personal Information Act* which allows companies to refuse to convey personal information when the disclosure conceivably risks having an impact on a judicial proceeding.

Lastly, and subsidiarily, in the event the Commission did not retain the preceding arguments, the company asserted that the recommendations in these reports should be kept confidential, as is the case in the public sector, but the body of the reports could be sent to the applicant through his regular physician as provided for by Section 37 of the *Personal Information Act* which reads as follows:

> "37. A person carrying on a professional health care enterprise may temporarily refuse to the person concerned access to the file established on him if, in the opinion of a health care professional, consultation would result in serious harm to the person's health.
>
> A person carrying on another type of enterprise and holding such information may refuse to the person concerned access to the information related to him, provided that he offers the person the possibility of designating a health care professional of his choice to receive communication of the information and

communicates the information to such physician.

The health care professional shall determine the time at which consultation may take place and inform the person concerned thereof."

THE COMMISSION'S DECISION

The Commission rejected each and every argument adduced by the company and ordered the requested expert medical reports to be sent to the employee through his regular physician. Essentially, the Commission's decision was based on the following arguments:

1° because the company did not justify its refusal to give access as required by Section 32 of the *Personal Information Act* and because the solicitors' secretary told the applicant that he would have access to the requested medical reports through his regular physician, the company waived solicitor-client privilege;

2° besides this waiver, it is doubtful that solicitor-client privilege could be invoked in a similar case because the information in dispute does not fall under the category of solicitor/client privilege but doctor/patient privilege. Moreover, the expert reports were not prepared or filed in conjunction with a civil or administrative suit nor were they requested by the company's solicitors but by the company itself to reach a decision;

3° furthermore, with respect to medical-related information, Section 37 of the Act contains strict restrictions to access rules, namely access through the regular physician (who, as the case may be, may invoke serious harm to the patient's health to delay the disclosure). Consequently, companies cannot invoke Section 39 of the Act to object to the disclosure of an expert medical report even if the disclosure conceivably risks having an impact on a legal proceeding;

4° in any event, a company could not justify its refusal to give access to an expert medical report when the expert physician who prepared this report is himself obliged to provide it to the person concerned pursuant to Article 4.02 of the Code of Ethics of Physicians.

5° finally, contrary to the Access to Information Act, the Personal Information Act contains no restrictions on the confidentiality of recommendations.

OUR ANALYSIS OF THIS DECISION AND ITS CONSEQUENCES

We cannot help but be surprised at the Commission's decision. Without analyzing this decision in detail, we nonetheless believe that some aspects merit further discussion.

First of all, this decision is indicative of the very severe attitude adopted by the Commission with respect to companies which have only been subject to the *Personal Information Act* for a few short months. By blaming Dow Chemical for not having answered the request for access within the delay and not having justified its refusal but, especially, considering the fact that the company's solicitors' secretary had verbally waived the benefit of professional secrecy on their behalf, the Commission showed that it did not intend to be lenient toward companies.

This uncompromising attitude is difficult to understand given the fact that four or five years went by in the public sector after the *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* had came into force before a similar trend was detected by the Commission with respect to public bodies.

In this case, we are concerned about the correlation the Commission makes between the company and its external solicitors to the extent that it considers a waiver of solicitor-client privilege made by the latter's secretary as valid. If the oath of secrecy is a fundamental right of citizens, including corporate citizens, should it not be up to them to waive it?

Needless to say, the Commission's interpretation of Section 37 of the Act, namely that access to medical-related information, including expert reports, cannot be refused because of the impact of its disclosure on a judicial proceeding is surprising. In fact, this interpretation imposes stricter access rules on the private sector than on the public sector. Yet, it seems to us that the wording of Sections 37 and following of the *Personal Information Act* could have easily lent itself to an interpretation which takes the strategic nature of expert medical reports into consideration.

It is our opinion that Section 37 of the *Personal Information Act* simply provides an additional restriction to general rules of access in cases where the disclosure of medical information could cause serious harm to the health of the person concerned. But, in our opinion, there is nothing in this Act to conclude that Section 37 is the only restriction that might apply to medical information.

Moreover, we believe that by putting a person's regular physician on the same footing as the examining physician mandated by a company to prepare an expert medical report, the Commission has substantially amended the law in force in this field and, consequently, disrupts labour relations management.

It is common practice for an examining physician or expert to send his report exclusively to the person or company requesting it. Moreover, Article 2.03.31 of the Code of Ethics of Physicians provides for this by implementing specific rules for this type of professional intervention where the physician does not maintain a therapeutic relationship with the patient. The legislator even had to adopt a specific provision to overcome this difficulty for occupational health and safety purposes, in An Act respecting industrial accidents and occupational diseases.[4]

Thus, the direct consequence of the singular interpretation which the Commission gives to the Code of Ethics of Physicians obliges the examining physician to establish a relationship of trust with the employee (or with the insured) while he is mandated by the employer (or by the insurer) in the context of a current or foreseeable litigation.

In the case at hand, the Commission is totally silent on the fact that the 1994 expert reports were conducted in a contentious situation at which time the employee had already filed a dismissal complaint with the Labour Standards Commission.

Lastly, it must be clearly understood that the Commission's recent decision, if maintained by the courts, could conceivably have the following effects:

- the employee (or his union) could at any time get a copy of an expert medical report requested by the employer to verify absences or make administrative decisions while the employer would be

unable to get the expert report from the opposing party before the hearing;

- an employee could even get a copy of an expert medical report prepared at the employer's solicitors' request within the framework of a civil or administrative suit;

- the insured who receives a disability benefit and is obliged by the insurer to undergo an expert medical examination could at any time get the expert medical report to contest the insurer's decision;

- further to a claim, the victim could probably get a copy of the liability insurer's expert medical report and, before settlement, ascertain the disability percentage established by its physician.

SOME *CAVEATS* AND RECOMMENDATIONS

If Dow Chemical's motion for leave to appeal is granted, two to three years will probably elapse before the Court of Quebec rules on the merits of this important Commission decision. However, in the meantime, companies would be well advised to learn from this case law.

First of all, as for processing access requests, the X vs. Dow Chemical Canada Inc. decision shows the importance of naming within every company a person responsible for access and the protection of personal information who will receive requests, process them within the 30-day delay and, as the case may be, justify refusals by basing himself on the relevant provisions of the Act. In fact, we believe that the Commission would have been less strict had the company in question at least respected the procedural requirements of the Act.

Also along these lines, we believe that companies would be well advised to adopt internal directives to ensure that their employees and executives automatically channel access requests (written or verbal) to the designated person in charge. In this way, the Commission will not interpret comments or written statements made by an employee or an executive of the company as being waivers to the confidentiality of a document or information.

As for expert medical reports and other information of this nature, we have every reason to believe, in particular, for the aforementioned reasons, that they are ill-founded in law. From now on, if your company receives a request to access such a document, either from an employee or an insured, and if it deems that the disclosure of this document will prejudice a hearing or case in progress, we believe that it could object to the disclosure. Until the Court of Quebec rules on this issue, the company should invoke Section 39 of the *Personal Information Act* as well as solicitor-client privilege to object to the disclosure of such information.

Having said this, to maximize the possibility of having the confidential nature of expert medical reports acknowledged by the Commission or, as the case may be, by courts of law, companies should in our opinion initiate the following steps:

- requests for expert medical reports should be sent in writing to the expert and, in a detailed manner, indicate the litigation for which they are requested;

- the company's examining physician or expert should be encouraged to refer a request to access an expert medical report to the

company for which he is acting. Section 16 of the Act specifically authorizes such a reference;

- a company's external solicitors should adopt a similar attitude to avoid a situation like the one which occurred in the Dow Chemical case where the company's solicitors directly received an access request from their client's employee to which they did not respond within the delay set forth by law and according to prescribed procedure;

- lastly, in its decision, the Commission seemed to have attached importance to the fact that the expert medical report in question had not been ordered by the company's solicitors but by the company. *A contrario*, we wonder if the Commission would have been more favourable to the argument of confidentiality based on solicitor-client privilege had their solicitors asked the examining physician to conduct the expert medical report.

To summarize, this decision confirms that companies should not take access requests or disputes submitted to the Commission lightly. The consequences of the application of this new act may be very serious in the long run not just for companies themselves but for the business community as a whole.

Raymond Doray

1 X vs. Dow Chemical Canada Inc., *Commission d'accès à l'information*, Nos. 940246 and 940385, dated June 16, 1994.

2 Dow Chemical Canada Inc. vs Bérard, No. 500-02-014466-945.

3 *The Act Respecting the Protection of Personal Information in the Private Sector* came into force on January 1, 1994 except for some provisions pertaining to gathering personal information and commercial and philanthropic canvassing which came into force on July 1, 1994.

4 An Act respecting industrial accidents & occupational diseases. R.S.Q. C.A-3.001, ART. 215

WHAT'S NEW ?

The *Commission d'accès à l'information* has just handed down its decision in the case of X vs. Equifax Canada Inc. (File No. 94 00 84) acknowledging that credit bureaus or personal information agents can record in their files the fact that an individual has been the subject of a personal bankruptcy. This information can be kept for six (6) years effective the release date of the bankruptcy and, if no release occurs, for a period of seven (7) years after the registration date.

This decision comes on the heels of a request made to Equifax Canada Inc. by a consumer who, basing himself on Article 40 of the Quebec Civil Code, asked to have his credit file corrected and some information pertaining to his personal bankruptcy deleted. In particular, he asserted that after three and a half years the information was no longer relevant.

In a somewhat concise judgment, the court acknowledged that the evidence adduced by Equifax Canada Inc. convinced it that the claimant's file should not be corrected because the information pertaining to his bankruptcy was not outdated. In passing, Lavery, de Billy represented Equifax Canada Inc.

Although this decision constitutes an important victory for the business community, we ask ourselves if the Commission has the jurisdiction to rule on the outdated nature of personal information or to decide on the validity of the preservation period. In fact, we tend to believe that the Commission does not have jurisdiction which falls exclusively under governmental control. Subsection 90(3) of the *Personal Information Act* stipulates that the government can pass regulations to determine personal information retention schedules. Inversely, the X v. Equifax Canada Inc. decision seems to establish that not only can the Commission rule on the outdated nature of personal information but it can also rule on the retention schedules. Sooner or later, courts of law will have to rule on this issue which for the time being has not been decided in any definitive way.

IN FORCE SINCE JULY 1ST ....

Section 5 of the *Personal Information Act* which stipulates that a company can only compile personal information necessary to meet the object of the files which it has created.

Section 6 which stipulates that, as a general rule, a company can only gather personal information from the person concerned himself. The Act does however contain three exceptions to this rule namely, that a company can gather personal information from third parties:

1° when it is compiled in the interest of the person concerned and it cannot be compiled from him in due time;

2° when gathering the information from a third person is necessary to ensure its accuracy;

3° when the law authorizes gathering this information from a third person.

However, before gathering personal information from a third person, the company must ensure that the third person is authorized to convey the requested information. More particularly, if the third party is a company subject to the *Personal Information Act*, it cannot, as a general rule, convey the requested information without the manifest, free and enlightened consent of the person concerned (Section 13).

Section 7 is to the effect that companies must record the sources of the information they receive when these sources are companies subject to the *Personal Information Act*.

Section 8 stipulates that every company which creates a new file and, as a result, gathers personal information from the person concerned must send this person a notice indicating:

1° the object of the file;

2° how the file will be used;

3° the categories of persons who will have access to the information;

4° the location where the file will be kept;

5° the rights to access and make corrections.

This obligation only applies to files created on or after July 1, 1994 and not before.

As a result of **Section 9**, companies cannot refuse to respond to a request for goods or services or a job application because the person concerned has refused to provide personal information which is necessary to conclude or execute the contract or if the law has not authorized the gathering of this information. If a company has reasonable grounds to believe that a request for goods or services is not lawful, it may insist upon information from the person concerned even if it is not necessary to conclude or execute the contract.

In case of doubt, personal information will be considered unnecessary. In the event of litigation, it will be up to the company to show that the information which it compiled was necessary.

Subsection 22(2), the second paragraph of Section 23 and Sections 24 to 26 contain the rules to be followed when personal information is used for philanthropic or commercial canvassing. In particular, they stipulate that individuals have the right to have their names, addresses and telephone numbers deleted from the solicitation list. Subject to certain conditions, companies are obliged to inform solicited individuals about their rights to opt out and give them the opportunity to exercise them.

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