

Insured's access to the claims adjuster's reports

By Philippe Cantin

Last April 12¹, Mr. Justice Michel Simard of the Court of Quebec reversed a decision of the Commission d'accès à l'information² which had ordered La Sécurité, assurances générales to deliver to its insured two reports concerning the insured which had been prepared by claims adjusters.

The facts

Between May and July 1996, the residence insured was vandalized twice. The insurer directed two claims adjusters to investigate the circumstances of the losses. Following receipt of the reports by La Sécurité, the insured were compensated without any legal proceedings being initiated.

A few months later, the insured requested from their insurer copies of all reports concerning them. La Sécurité having refused to disclose the full reports, the insured invoked the *Act respecting the Protection of Personal information in the Private Sector*³ and filed a request with the *Commission d'accès à l'information*.

Decision of the Commission d'accès à l'information

The insurer alleged before the Commission that the documents requested were confidential and protected by professional secrecy. The dispute focused on the interpretation given to the following provisions:

- *Charter of Human Rights and Freedoms*⁴

"Art. 9: Every person has a right to non-disclosure of confidential information.



No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, ex officio, ensure that professional secrecy is respected."

- *By-law of the Conseil des assurances de dommages respecting market intermediaries in damage insurance.*⁵

"Art. 199: A claims adjuster must respect the secrecy of any personal information that he obtains in carrying on his activities, unless he is relieved of that obligation by an express provision of an Act, by an order of a competent Court or by the carrying on of his activities."

The Commission granted the insured's request for the following reasons:

- The fact that Article 199 of the by-law uses the words "personal information" instead of "professional secrecy" does not give the claims adjuster's report the protection guaranteed by Article 9 of the Quebec Charter.
- The confidentiality of the claims adjuster's reports is accessory to the attorney/client privileges so that the insured may have access to them as long as they have not been transmitted to the insurer's attorney.

Court of Quebec decision

Keeping in mind that the right to professional secrecy must be interpreted liberally, the Court emphasized that one has to look for the intention of the legislator when it adopted the by-law, rather than only at the wording used. Therefore, according to Mr. Justice Simard, a



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¹ La Sécurité assurances générales vs. Gravel et al, 200-02-021608-999, april 12, 2000, J. Michel Simard;

² Gravel et al vs. La Sécurité assurances générales, [1999], C.A.I. 83, Commissioner Paul-André Comeau;

³ R.S.Q. c. P-39.1

⁴ R.S.Q. c. C-12 (hereinafter called the "Quebec Charter")

⁵ R.R.Q. vs I-15.1, r. 0.4

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willingness to submit the claims adjusters to professional secrecy is clearly stated in the provisions of the above mentioned by-law.

Nor does the judge accept the argument that the claims adjuster's reports benefit from the protection of Article 9 of the Quebec Charter only when they have been communicated to the insurer's attorney. Although the presence of an attorney-insurer privilege would simplify the professional privilege determination, Article 9 of the Quebec Charter does not require it. Furthermore, to defeat this argument, insurance companies, according to the judge, could require their attorneys to mandate claims adjusters themselves, a process which could be costly and time consuming.

The Court determined that the claims adjuster's reports are protected by the professional secrecy provided for in Article 9 of the Quebec Charter. However, Mr. Justice Simard specifies that this protection does not automatically apply to the whole content of the claims adjuster's report. Indeed, the physical facts personally ascertained by the adjuster during his investigation and which are openly known are not considered information revealed to him and therefore are not confidential.

For example, shall not be considered confidential:

- comments on the state of the premises;
- findings on the extent of damages;
- material elements of proof;
- photographs.

However, the following shall be considered confidential:

- statements given (other than those from the insured);
- opinions and conclusions issued by the adjuster;
- any other element revealed to the adjuster;
- expert reports and opinions obtained by the claims adjuster.

This decision is in line with the one rendered in the case of *General Accident, compagnie d'assurances du Canada vs. Ferland*⁶ where in a similar context, Mr. Justice François Godbout had also reversed a decision of the *Commission d'accès à l'information* and denied the insured access to the report prepared by the insurer's claims adjusters as well as to the related information.

Conclusion

These decisions confirm the confidentiality of the claims adjuster's reports. It remains to be seen if the Quebec Court's direction will be followed by the *Commission d'accès à l'information* which, even after the *Ferland* case, had refused to give the protection granted under Article 9 of the Quebec Charter to the reports prepared by claims adjusters.

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⁶ [1997] C.A.I. 446 (C.Q.) J.E. 97-2209



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