By Léonie Derome and Jean-Francois Gagnon

Confidentiality of internal documents

Recent decision departs from Solmax ruling.

In July 2016, we published an article underscoring the 10th anniversary of the Supreme Court of Canada's decision in *Blank v. Canada (Minister of Justice)*, in which we examined how it had been applied by courts in Quebec in the intervening decade.

Among the judgments referenced in our article, the decision of the Quebec Court of Appeal in *Compagnie d'assurances AIG du Canada v. Solmax International Inc.* was significant for practitioners of insurance litigation. In it, the court held that documented exchanges between employees of an insurance company before litigation arose were not covered by the litigation privilege, as such documents were prepared in the ordinary course of the insurer's business, not primarily in anticipation of litigation.

The recent decision of the Quebec Superior Court in *Fiset-Trudeau v. Compagnie mutuelle d'assurances Wawanesa, 2017 QCCS 5071* departs significantly from the Court of Appeal's ruling in *Solmax*.

In this matter, the insured was claiming the insurance indemnity under its policy following a fire and alleged that the insurer had been negligent in handling the claim. During the pre-trial examinations, the insurer raised the litigation privilege in denying the insured's requests to obtain a copy of 1) the insurer's digital file, 2) memos of telephone conversations between the insured and its representatives and 3) all interim and final investigation reports in the insurer's possession.

In her reasons, judge Florence Ducas restated the principles governing the application of the litigation privilege, particularly in light of the Supreme Court of Canada's decision in *Lizotte v. Aviva Insurance Company of Canada*, as well as those identified by the Court of Appeal in *Union canadienne (L'), compagnie d'assurances v. St-Pierre, 2012 QCCA 433*, to the effect that the investigation reports of a claims adjuster are protected by the litigation privilege when they are instrumental in the conduct of the litigation by the insurer's counsel. That decision also held that the confidentiality of documents by virtue of the litigation privilege did not prevent the insured from obtaining information and particulars pertaining to the insurer's defence allegations.

After reviewing these principles, Ducas concluded the interim and final investigation reports in the insurer's possession were incontestably protected by the litigation privilege. As for the insurer's digital file, the court found that it contained all the constituent elements of the investigation report, whose primary purpose was to prepare for eventual litigation.

The court found that the insurer had not waived the privileged nature of the digital file by electing to have its representative testify as a witness. The judge emphasized that the insurer never evinced a clear intent to waive the privilege and that it was rather the questions posed by plaintiff's counsel that prompted the witness to mention the digital file's existence.

Finally, with respect to the memos of telephone conversations between the insured and the insurer's representatives, the court applied by analogy the principle arrived at in the Court of Appeal's decision in *Prévoyance (La) Cie d'assurance v. Construction du fleuve Ltée* to the effect that a claims adjuster is not obliged to disclose the various stages of the investigation, documents written when they were not under oath or statements obtained from potential witnesses. Ducas was of the view that the memos of conversations with the insured pertained to stages of the investigation and were thus also protected by the litigation privilege. The judge specified that this conclusion did not prevent the insured from obtaining particulars of facts at issue in the litigation through more specific questions during the examination of witnesses.

It is somewhat astounding that the judge made no reference to the *Solmax* decision or the established criterion regarding documents prepared in the ordinary course of the insurer's business. Instead, the court adopted the position of the Court of Appeal in *Union canadienne (L'), compagnie d'assurances v. St-Pierre*, in which it held that the memos and comments of the insurer's employees were privileged because they were made in connection with the decision as to whether the claim was covered and, in the event it was decided that coverage did not apply, in order to support the insurer's position should litigation ensue.

Because the period for appealing the *Fiset-Trudeau* decision has expired, the Court of Appeal will not have the opportunity to decide whether its conclusions, made without reference to the court's decision in *Solmax*, are well founded. IH

Léonie Derome is a lawyer and Jean-Francois Gagnon is a partner with Langlois Lawyers in Montreal.

© 2018 Thomson Reuters Canada Ltd. Reprinted with permission.