Recent Quebec Manulife Decision – Canary in the Coalmine?

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Last week (on May 7, 2014), Justice Soldevida, J.S.C. of the Quebec Superior Court released her judgment in the *Manulife* case.[2] She ordered Manulife Financial to release without redaction all 63 documents sought by the plaintiffs in a class action law suit that related to interactions and interventions by Manulife's federal regulator (**OSFI**) respecting risk assessments and capital adequacy concerns leading up to and following the economic crisis of 2008. Manulife argued that the documents, which included Audit and Risk Committee minutes, Executive Committee minutes and presumably communications between the company and OSFI, were protected by statutory confidentiality provisions imposed by Regulations[3] under the *Insurance Companies Act* (**ICA**) and the *Office of Superintendent of Financial Institutions Act* (**OSFI Act**).

Whether or not the case is successfully appealed, it highlights a question that all companies and I would suggest Parliament, Provincial Legislatures and regulators should be concerned about, namely, under what circumstances should interactions between the regulator and regulated entities, including self-assessment and corporate governance documents of the regulated entities, be shielded from use by plaintiffs in law suits against the regulated entities? This paper examines the issues, the proposed balancing that the Canadian Council of Insurance Regulators (**CCIR**) has proposed and the provisions that two provinces to date have enacted.

First, back to the *Manulife* case. The Quebec Court (a civil law jurisdiction), as other Canadian courts have done in the past, has acted vigilantly in allowing parties to litigation obtain information and facts from the opposing party. This is because the information is considered to be essential for the integrity and proper functioning of our adversarial system of dispute resolution. As a result, confidentiality of the information, whether voluntary, by contract or even mandated by statute will be narrowly interpreted. The courts prefer to allow the party seeking the information for purposes of litigation to have access, either under terms of confidentiality agreed to by the litigants or those imposed by the Court. This is what transpired in the *Manulife* case at the first instance. The Court refused to construe the express confidentiality provisions contained in the Regulations as prohibiting disclosure to the plaintiff. This decision is consistent with common law decisions involving insurance companies that had previously ordered disclosure. The Quebec judge found the same reasoning applicable to the civil law jurisdiction of Quebec.

This case stands for the proposition that, unless Parliament or the Legislature enact specific provisions prohibiting access to information except to specific individuals, and the courts understand the reason for those restrictions, the courts will order disclosure if the information sought is relevant to the case.

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2 *Comité syndicat national de retraite Bâtirente inc*. c. *Société financière Manuvie*, 2011 QCCS 3446

3 *Supervisory Information (Insurance Companies) Regulations* SOR/2001-56 as amended

An example of a specific legislative provision in Quebec considered by the Court is Article 218 of Quebec's *Health Services and Social Services Act* which states that:

> "Notwithstanding the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), the records and minutes of the council of physicians, dentists and pharmacists and of each of its committees are confidential. ... No person may have access to the minutes of a committee of the council of physicians, dentists and pharmacists except the members of the committee, the members of the executive committee of the council, the Administrative Tribunal of Québec or the representatives of a professional order in the performance of the duties assigned to it by law."

The Court appeared to be sympathetic to, and willing to enforce, the public policy reason behind shielding the minutes of committees of councils of physicians, dentists and pharmacists. Yet the Court refused to apply these principles from the medical sector to the financial services sector.

Regulators understandably wish to protect themselves from being dragged into civil litigation. The federal Parliament enacted legislation to prevent this for OSFI's benefit after OSFI became embroiled in litigation involving Great-West Life's acquisition of London Life[4]. It passed section 39.1 of the OSFI Act in 2012 which provides:

> The Superintendent, any Deputy Superintendent, any officer or employee of the Office or any person acting under the direction of the Superintendent, is not a compellable witness in any civil proceedings in respect of any matter coming to their knowledge as a result of exercising any of their powers or performing any of their duties or functions under this Act or the Acts listed in the schedule.

The difficulties Manulife faced with respect to its governance documents apply equally and perhaps even more so to the self-assessment compliance procedures and systems that financial institutions are required have in place for OSFI.[5] In addition, the provisions of Anti Money Laundering and Anti-Terrorism Financing[6] and Privacy[7] legislation all require corporate governance structures (boards or committees) to establish a system for monitoring compliance and a compliance officer to oversee the system. I have warned for years that, from a litigation perspective, this is like building an Exocet missile with the company's home address programmed in.[8]

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4 *Jeffery v London Life Insurance*, 2010 ONSC 4938, 193 ACWS (3d) 971, (Trial Decision); 2011 ONCA 683, 208 ACWS (3d) 575, (Court of Appeal); and 2011 ONCA 683, leave to appeal to SCC refused, 302 OAC 398 (note). See Palmay - *Dealing With Participating Funds - Round 2 Is Final* – Mondaq June 2012 and McMillan publications.

5 See OSFI Guideline E-13 – Legislative Compliance Management (LCM).

6 See *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*

7 See *Personal Information Protection and Electronic Documents Act.*

8 During the Falklands war, the defence systems of *HMS Sheffield* were unable to detect the Argentinean exocet missiles as "hostile" because the French had delivered them to Argentina programmed with NATO codes. See http://www.telegraph.co.uk/news/uknews/defence/9767736/Thatchers-blistering-attack-on-French-over-Exocets-during-Falklands.html; http://en.wikipedia.org/wiki/Events_leading_to_the_Falklands_War; http://www.dailymail.co.uk/news/article-2253942/Margaret-Thatchers-war-treacherous-Francois-Mitterrand-Exocet-missile.html;

A possible solution to this concern as well as the concern that Manulife faces may be found in the laws relating to privilege.

By far the strongest legislative provision is statutory "privilege". A number of the provincial insurance statutes contain a very limited form of privilege. The Alberta version is typical:

> 816.1 **Privileged information** Any information, document, record, statement or other thing concerning a person licensed or applying for a licence under this Act that is made or disclosed to the Minister, the Superintendent, the Deputy Superintendent or an examiner by a person other than the person licensed or applying for a licence **is privileged and may not be used as evidence in any civil or administrative proceeding brought by or on behalf of that person**.[9] [emphasis added]

As can be seen from the highlighted parts, this provision is quite narrow and was enacted to shield the regulator from attacks and challenges by the regulated. It would likely not have protected Manulife in resisting production sought by a plaintiff.

The CCIR Privilege Working Group identified protecting self-assessments by insurance companies as an issue worthy of legislative consideration and suggested statutory wording in 2008 to achieve this objective.[10] Alberta adopted privilege protection in 2008 in its *Insurance Act* which provides as follows:

> 816.2(1) **Insurance compliance self-evaluative audit** In this section,
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> (a) "insurance compliance self-evaluative audit" means an evaluation, review, assessment, audit, inspection or investigation conducted by or on behalf of a licensed insurer or fraternal society, either voluntarily or at the request of the Minister or the Superintendent, for the purpose of identifying or preventing non-compliance with, or promoting compliance with or adherence to, statutes, regulations, guidelines or industry, company or professional standards;
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> (b) "insurance compliance self-evaluative audit document" means a document with recommendations or evaluative or analytical information prepared by or on behalf of a licensed insurer or fraternal society or the Minister or the Superintendent directly as a result of or in connection with an insurance compliance self-evaluative audit and includes any response to the findings of an insurance compliance self-evaluative audit, but does not include documents kept or prepared in the ordinary course of business of a licensed insurer or fraternal society.
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> (2) Subject to subsection (6), an insurance compliance self-evaluative audit document is privileged information and is not discoverable or admissible as evidence in any civil or administrative proceeding.
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> (3) Subject to subsection (6), no person or entity may be required to give or produce evidence relating to an insurance compliance self-evaluative audit or any insurance compliance self-evaluative audit document in any civil or administrative proceeding.
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> (4) Disclosure of an insurance compliance self-evaluative audit document to a person reasonably requiring access to it, including to a person acting on behalf of a licensed insurer or fraternal society with respect to the insurance compliance self-evaluative audit, to the external auditor of the licensed insurer or fraternal society, to the board of directors of the licensed insurer or fraternal society or a committee of the licensed insurer or fraternal society or to the Minister or the Superintendent, whether voluntarily

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[9] See comparable provisions of Section 116 of the Ontario *Insurance Act*; Section 462 of the *Saskatchewan Insurance Act*; Section 90 of the Newfoundland Labrador *Insurance Companies Act;* Subsection 7(2)of the New Brunswick *Insurance Act*; and Subsection 350(2) of the *Insurance Act* of Prince Edward Island.

[10] See http://www.ccir-ccrra.org/en/init/Privilege/Final_Report_on_Privilege_Model_July08.pdf. Also see Waterman and Palmay - *Compliance databases and the issue of privilege* Lexology April, 2010.

> or pursuant to law, does not constitute a waiver of the privilege with respect to any other person.
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> (5) A licensed insurer or fraternal society that prepares or causes to be prepared an insurance compliance self-evaluative audit document may expressly waive privilege in respect of all or part of the insurance compliance self-evaluative audit document.
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> (6) The privileges set out in subsections (2) and (3) do not apply
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> (a) to a proceeding commenced against a licensed insurer or fraternal society by the Minister or the Superintendent in which an insurance compliance self-evaluative audit document has been disclosed,
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> (b) if the privilege is asserted for fraudulent purposes,
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> (c) in a proceeding in which a person who was involved in conducting an insurance compliance self-evaluative audit is a party seeking admission of the insurance compliance self-evaluative audit document in a dispute related to the person's participation in conducting the insurance compliance self-evaluative audit, or
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> (d) to information referred to in an insurance compliance self-evaluative audit document that was not prepared as a result of or in connection with an insurance compliance self-evaluative audit.[11]

These provisions apply to insurance compliance systems and their output. If similar provisions had been enacted in the ICA, Manulife might have had a stronger argument for documents prepared as part of its compliance program including special efforts directed at responding to specific events arising from the 2008 crises or specific demands of OSFI. However the "documents kept or prepared in the ordinary course of business" carve out in the definition of "insurance compliance self-evaluative audit document" could be an impediment to having the privilege apply to minutes of committees of the insurer if the committee meetings were in fulfillment of the mandate of the committee.

In the meantime, it is our practice to recommend that insurers "ensure" that any problems identified by their compliance programs or governance processes seek to have the protection of "solicitor client privilege" which the courts understand and apply with vigour.[12]

In conclusion, the *Manulife* decision illustrates the problems that financial institutions can face when plaintiffs, whether in the context of class actions or well-funded individual law suits, seek to acquire potentially damaging internal company governance, compliance and regulatory information to further their case. In some ways this case is akin to the "canary in the coal mine", an early warning system used to alert miners when carbon monoxide or carbon dioxide reached unsafe levels in the mines.

It is time for the industry to once again pull together and lobby Parliament to amend the ICA (the next major overhaul is due in 2017) and legislatures to amend the legislation of the remaining provinces/territories to follow the lead of the CCIR, Alberta and Manitoba. In recognition that more and more of the compliance function is being placed on corporate governance, consideration might also be given to expanding the scope of the "compliance self-evaluative audit" privilege to cover the portions of the minutes of committees and boards that deal with this.

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[11] See Palmay – *Alberta Provides Privilege for Self-Assessment Programs* - McMillan (Lang Michener) publication Spring 2009.Manitoba introduced a similar provision in Section 84.1 of the *Insurance Amendment* Act, assented to June 14, 2012 – yet to be proclaimed in force.

[12] See Palmay - *Insurance Self-assessment Programmes and the Issue of Privilege* – International Law Office 2008; Waterman and Palmay – *A privilege primer* – Lexology 2010; and Palmay and Waterman – Risk/Compliance Management Systems and Privilege – Martindale (copy here) or from the author

A number of statutes have been diligent in addressing and shielding the regulators from becoming embroiled in civil trials. It is time to consider providing similar protection for the regulatory efforts of the regulated.

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