

Legal update

The Supreme Court of Canada confirms the possibility for an insurer to invoke litigation privilege for communications with a claims adjuster

November 2016 Insurance Litigation

On November 25 the Supreme Court of Canada rendered its decision in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

In this case, the professional order supervising claims adjusters in Quebec was investigating the conduct of a claims adjuster. In the context of its investigation, it asked an insurer for a copy of its claim file pertaining to one of its insured.

The request of the order was based on Section 337 of the *Act respecting the distribution of financial products and services*, which provides the order with the right to obtain “any document” that is relevant to its inquiry.

According to the order, the law did not allow it to require the disclosure of documents protected by solicitor-client privilege. However, the same protection was not afforded to documents falling under litigation privilege.

The order argued that the protection afforded by the litigation privilege had been expressly set aside by the wording of section 337 of the *Act respecting the distribution of financial products and services*.

In a unanimous decision, the Supreme Court rejected the order’s arguments on the grounds that a legislative provision that simply refers to the communication of “any document” is not sufficiently explicit to set aside the litigation privilege.

In doing so, the Supreme Court confirmed the possibility for an insurer to invoke the litigation privilege with respect to communications with a claims adjuster. This question had been previously discussed at courts of appeal level, but never by the Supreme Court of Canada.

For example, in *Union canadienne (L’), compagnie d’assurance c. St-Pierre*, 2012 QCCA 433, the insured asked for a copy of the investigation report prepared by the claims adjuster at the request of the insurer. The Quebec Court of Appeal dismissed the demand of the insured on the grounds that the report was protected by litigation privilege.

In *Lizotte v Aviva Insurance Company of Canada*, the Supreme Court of Canada confirmed the possibility for the insurer to invoke litigation privilege, not only against the insured, but also against the professional order supervising claims adjusters.

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