

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 13 to 18, 2008

Insured Privacy Expectations and Experts: The Role of PIPEDA

James Borowski and Aviva Canada Inc., FSCO A07-002593, September 15, 2008, Arbitrator Rogers

MVC October 24, 2001. Insured applied for and initially received benefits but later disagreement occurred on whether there was entitlement and on catastrophic impairment status. Insured attended insurer catastrophic impairment examinations. Following a failed mediation, the insured was served with additional reports from U.S. physicians working at Brigham & Associates. These doctors had performed a 'paper review'. Insured on a motion sought exclusion of the reports on various grounds, including that he had not consented to his personal information being provided to Brigham & Associates.

The *Personal Information Protection and Electronic Documents Act 2000, S.C. 2000, c.5* ("PIPEDA") regulates the collection, use and distribution of information collected in the course of a commercial activity. For PIPEDA to apply, a third party must have an insured's personal information and that information must have been collected in the course of commercial activity. The circumstances will determine how PIPEDA applies.

Arbitrator Rogers noted that 'paper reviews' of insured's medical files are relatively common and the practice is not censured. He noted that an insured has a reduced expectation of privacy in the circumstances and there is an implicit consent to the acquisition of expert opinions. Rogers was careful to add that this did not mean that an insurer had no limits on what could be done to an insured's personal information. The circumstances of this case were such that Brigham & Associates were agents of the insurer. As agents of the insurer, it did not collect or distribute information outside of PIPEDA. He also found that such reports were admissible.

He additionally commented that matters relating to the manner in which the reports were generated would go to the weight given to the report. The content of the report, which in this case included an interpretation of the American Medical Association Guidelines, would be judged as to whether opinions expressed were the proper subject of an expert opinion. Rogers felt that the former 'interpretation' was not the proper subject of an expert report.

Implications & Commentary:

Insureds expectations of privacy are reduced in the context of accident benefits and tort claims. The expectation of reduced privacy for litigants is reflected in provincial and federal privacy legislation. Insured's need to be aware that as long as information is related to the receipt of benefits or to a lawsuit, it may be admissible.

However, there are limits imposed on both insureds in a SABS and in a tort situation when it comes to what can be done with an insured's information. It would also be reasonably safe to conclude that insurers are not entitled to collect personal information about non-insured's through the SABS process.

Accessing Arbitration Decisions

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