

## News

## Confidentiality not absolute, appeal court affirms

LUIS MILLAN

The Quebec Court of Appeal has upheld a lower court ruling that could have a chilling effect on the flow and quality of confidential information financial institutions disclose to regulatory authorities, and perhaps even undermine the “safety and soundness” of Canada’s financial system, according to business lawyers.

In a majority decision in line with two Ontario Superior Court decisions, the Quebec Court of Appeal held that documents and exchanges between federally regulated firms such as banks and insurance companies with the Office of the Superintendent of Financial Institutions (OSFI) are protected by statutory confidentiality provisions under the *Insurance Companies Act*, with some exceptions. While the regulations were enacted to limit the communication of supervisory information, the appeal court found that sections 2 and 3 did not create an absolute prohibition on disclosure and could be subject to production in civil proceedings.

“Although we all agree with the importance of the right to the truth and disclosure of evidence, we are dealing here with an argument relating to public interest privilege, which I think prevails,” said Jean Saint-Onge of Lavery, de Billy in Montreal. “This ruling could jeopardize the quality of the exchanges between the superintendent and financial institutions, could also undermine the confidence these companies have in the confidential disclosure scheme, and possibly negatively affect the effectiveness of the regulatory control of the Canadian financial system.”

The decision was issued as part of a \$1.4 billion certified class action against Manulife Financial and some of its officers by Mouvement d’éducation et défense des actionnaires (MEDAC), a non-profit shareholders’ rights organization. The class action alleges that Manulife made negligent representations over its risk-management practices and policies, and failed to disclose the extent of its exposure to equity markets during the 2008 financial crisis. The class action was certified in Quebec in 2011, and a similar suit was certified in Ontario last year.

As part of the class action, MEDAC sought access to 63 documents from the insurer that contained information regarding OSFI’s supervision of Manulife during the financial crisis. Manulife objected, claiming that they were covered by the statutory prohibition on disclosure and were otherwise privileged. The insurer also argued that the documents were highly confidential and contained important commercial informa-



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Lavery, de Billy



appeal court Justice Dominique Bélanger, whose reasons Justice Guy Gagnon concurred with, noted that “we must not automatically conclude that the legislature sought to impose an absolute prohibition of disclosure that includes legal proceedings merely because a statutory provision sets up a confidentiality regime.”

Justice Bélanger also pointed out that the legislator amended the *Office of the Superintendent of Financial Institutions Act* in 2012 to add section 39.1, which created a complete immunity from disclosure for the superintendent and OSFI staff. The 2012 amendment, however, did not alter the confidentiality obligation imposed on companies to include an absolute prohibition on disclosure. In fact, the sole objective behind the 2012 amendment was to prevent the superintendent and OSFI staff from being summoned to appear in court, added Justice Bélanger.

“In this case, if the legislature had wanted to set up an absolute prohibition, it would have stated that any type of disclosure is prohibited, even in the course of judicial proceedings, a drafting technique used in other statutes,” said Justice Bélanger, in *Société financière Manuvie c. D’Alessandro* [2014] J.Q. no 14394.

Justice Bélanger added that it was not shown that the public interest in maintaining the confidentiality of the Manulife documents was greater than the importance of disclosing it for the administration of justice. The trial judge was therefore correct to apply the rule of rel-

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**Claude Marseille**  
Blake, Cassels & Graydon

tion. In the meantime, MEDAC and Manulife reached an agreement to preserve the confidentiality of the documents and to limit MEDAC’s use of them. Manulife produced redacted versions of the documents, and the parties agreed that the appropriateness of the redactions would be determined by the court.

The trial judge held that the regulations provided only an obligation of confidentiality and did not provide for statutory immunity, a conclusion that the majority of the appeal court upheld. Quebec

evance and order the disclosure of materials relevant to the dispute. Besides, added Justice Bélanger, there was no reason to believe that the measures implemented in the confidentiality agreement reached between Manulife and MEDAC were insufficient to maintain confidentiality of the documents.

Dissenting Justice Benoît Morin said that the prohibition on disclosure was absolute, and applied to all supervisory information, otherwise section 39.1 of the OSFI act is void of any practical effect.



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**Simon Hebert**  
Siskinds LLP

The decision will likely open the door to more claims that confidential documents be produced, with relevance guiding the scope of the disclosure, said Claude Marseille, who represented the intervening Canadian Life and Health Insur-

to anyone, directly or indirectly. Yet, the decision orders an insurance company to disclose this information to a private third party in the context of a civil suit, on the sole basis of relevance, although the purpose of the federal regulations was precisely to prevent such a third party to have access to it.”

More alarmingly, added Marseille, allowing third parties to compel the production of confidential and sensitive information in subsequent civil proceedings is likely going to impede exchanges between financial institutions and OSFI, which in turn may hinder OSFI’s ability to react quickly in identifying deficiencies and trends in the marketplace to the “detriment of the safety and soundness of the Canadian financial system.”

Simon Hebert, a Quebec City lawyer with Siskinds LLP who successfully represented MEDAC in the case, says the impact of the decision is not nearly as “dramatic” as the interveners argued before the courts.

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“This decision is likely (going) to encourage claims that information, the disclosure of which is prohibited by law, nevertheless must be disclosed in the context of civil proceedings, at the request of a third party who is not supposed to have access to it,” said Marseille, of Blake, Cassels & Graydon, in an e-mail to *The Lawyers Weekly*.

“Federal regulations formally prohibit banks and insurance companies from disclosing supervisory information exchanged with OSFI