IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 664/90

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM AUTOMOBILE INSURANCE COMPANY

Applicant
(respondent on the preliminary issue)

- and -

THE CITADEL GENERAL ASSURANCE COMPANY

Respondent
(applicant on the preliminary issue)

PRELIMINARY ISSUE DECISION

COUNSEL:

Dara M. Lambe for the Applicant (Respondent on the preliminary issue)

J. Claude Blouin for the Respondent (Applicant on the preliminary issue)

ISSUE:

1. Is Citadel entitled to production of all the medical documentation in State Farm's accident benefit file for the purpose of the loss transfer arbitration?

DECISION:

2. Citadel is entitled to production of all the medical documentation contained in State Farm's accident benefit file.

HEARING:

1. This preliminary issue was dealt with by way of an agreed statement of fact and written submissions.

FACTS & ANALYSIS:

This loss transfer arbitration arises out of a motor vehicle accident which occurred on August 19, 2003. On that date, a vehicle owned and operated by Claudia Hislop and insured by State Farm Automobile Insurance Company ("State Farm") was struck in the rear by a heavy commercial vehicle insured by Citadel General Assurance Company ("Citadel"). There were a number of persons injured as a result of the accident who claimed and received accident benefits from State Farm. State Farm then commenced a loss transfer arbitration against Citadel. Citadel agrees that this is a loss transfer situation and pursuant to the fault determination rules, Citadel is 100 percent at fault for the accident.

On March 22, 2004, Citadel requested copies of the medical documentation in State Farm's accident benefit file in order that it might assess the reasonableness of the payments. State Farm took the position that it could not provide this without written authorization from the injured parties. Such written authorization has not been provided.

State Farm bases their refusal on essentially four grounds:

(i) relevance
(ii) the deemed undertaking rule
(iii) Personal Information Protection and Electronic Documents Act ("PIPEDA"), and
(iv) Health Information Protection ("PHIPA")

I will deal with each of these issues separately.

(i) Relevance

Briefly put, State Farm takes the position that a request for all medical documentation in the accident benefit file amounts to a "fishing expedition" and as such, it is not justified. It points to Ontario Insurance Commission (now F.S.C.O.) Bulletin 11/94, which states:

> "The second party insurer should be entitled to receive a summary of the accident benefits paid in respect to information about the condition of the person receiving accident benefits. The information furnished by the first party insurer should verify the amount claimed by the first party insurer were amounts actually paid to its insured. Information contained in the request for indemnification form should be sufficient in most cases. It was not anticipated that the second party insurer would be entitled to receive a complete copy of the accident benefit file, detailed medical and other personal information about the insured."

While O.I.C. bulletins do not have the force of law, I am in agreement with State Farm's position that it should be given substantial weight by arbitrators. I am not in agreement with State Farm's reliance upon the opinion of a lawyer, John McNeil, quoted in an industry magazine that:

> "where an arbitral decision is irreconcilable with the Ontario Insurance Commission Bulletin number 11/94, the view of the O.I.C. is the correct view".

It is the job of the arbitrator to interpret the law, taking into account, among other things, the O.I.C. Bulletin.

Loss transfer was established in pursuant to section 275 of the Insurance Act, R.S.O. 1990, c. I 8 which states:

> (1.) the insurer responsible under section 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the Regulations who is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the Regulation involved in the incident from which the responsibility to pay the statutory accident benefits arose.
>
> (2.) indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.
>
> (3.) no indemnity is available under subsection (2) in respect of the first $2,000.00 on statutory accident benefits paid in respect of a person described in that subsection.

> (4.) if the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitrations Act.
>
> (5.) no arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, and appeal under section 283 or a proceeding in a court in respect of statutory accident benefits.

It is well settled law that the first party insurers are obligated to provide proof of the reasonableness of payments made. In Jevco Insurance vs. Guarantee Company, summary No. 0030, July 29, 1994, Mr. Justice Moldaver adopted the arbitrator's reasons holding that in loss transfer cases that proof of payment alone is not enough to establish a loss transfer claim. The arbitrator stated:

> If Jevco wishes to seek indemnity from Guarantee then it has an obligation to establish that no fault payments were properly made. In order to so it has an obligation to produce the file, including the medical reports received.

Counsel for State Farm points out that the Jevco vs. Guarantee decision predated the O.I.C. Bulletin 1194. This is undoubtedly correct, however, as noted above, the Bulletin is not binding and I find the reasons of Mr. Justice Moldaver compelling. Where the reasonableness of payment is in issue and the payments are made, on the basis of medical reports, it only makes sense to allow the party that will have to ultimately pay, to have an opportunity to review those reports. While it may not be appropriate to produce the entire accident benefit file in cases

where the reasonableness of the payments has been put in issue, certainly the medical data is relevant. I note that in the Commercial Union Assurance Company of Canada vs. Voreal Property and Casualty Company (unreported decision of Arbitrator Samworth, dated December 21, 1998), a case referred to by both parties, the medical documentation had already been provided and was not in issue.

Having decided that the material is relevant, I will now deal with the remaining issues.

(ii) The Deemed Undertakings Rule:

State Farm submits that even if the documents are relevant, State Farm is bound by the "deemed undertaking rule" not to disclose the information for a collateral purpose, absent the express consent of the claimants or an order of the arbitrator. Citadel, quite rightly, in my view, argues that the deemed undertaking rule, as found in Rule 31 of the Rules of Civil Procedure, does not apply in an arbitration proceeding (see: Tanner et al. vs. Clark et al. [2002] O.J. 2558, a decision of the Ontario Divisional Court).

State Farm argues that the rationale behind the deemed undertaking rule is to protect, so far as it is consistent with the proper conduct of the action, the confidentiality of the party's documents. It submits that the rationale behind the rule broadens its application beyond those proceedings to which the Rules of Civil Procedure apply. While this may be so, the situation with regard to loss transfer and its interaction with accident benefits makes it somewhat unique. Loss transfer was created pursuant to section 275 of the Insurance Act. Thus, in certain situations, as set out in the appropriate regulations, first party insurers are allowed by law to recover accident benefits that they have paid out, from other insurers. Since this is allowed by law, and since the medical documentation is clearly relevant where the reasonableness of payments has been put in issue, it is surely implied that consent to the release of the information to the first insurer also implies consent to release to the second insurer. The release of such information to the second insurer is for the purpose of loss transfer only, as required by law. The second insurer cannot then use the information for any other purpose without the consent of the injured person or by way of court order.

(iii) Personal Information Protection and Electronic Documents Act ("PIPEDA")

State Farm submits that the provisions of the Personal Information Protection and Electronic Documents Act apply to this case to prohibit the disclosure of personal information of the claimants, absent their consent or an order of the arbitrator. The applicable sections of that Act are as follows:

> 4.3 - consent
>
> the knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate.
>
> 7 (3)
>
> for the purposes of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is . . .(c) required to comply with a subpoena or warrant or an order made by a Court, person or body with jurisdiction to compel the production or information or to comply with the rules or the Court to the production of records.
>
> 2 (1)
>
> "personal information" means information about an identifiable individual but does not include the name, title or business address or telephone number of an employee of an organization.

3.

> The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Citadel responds by relying on the decision of Justice Dawson in Ferenczy vs. NCI Medical [2004] O.J. No. 1775 and Mr. Justice Heeney in Kitchenham vs. AXA Insurance [2005] O.J. No. 1973. In the former case, Justice Dawson had to deal with the admissibility of surveillance in a civil procedure in light of the provision of PIPEDA. In allowing the video to be admitted, Justice Dawson indicated that the plaintiff in a civil action gives implied consent to the defence to collect, record and use personal information in so far as it is related to defending himself against the civil lawsuit. In the Kitchenham case, Justice Heeney dealt with the request for production to the accident benefit carrier of an independent medical examination report and surveillance video prepared in the tort action. The court ordered that the materials be produced, again holding that there was implied consent to disclose to those against whom he had commenced an action.

State Farm argues, correctly, that the situations is somewhat different in our case. In the cases cited above the courts held that there was implied consent between the injured party and the party being sued (Ferenczy) and between the implied party and the two insurers (Kitchenham). State Farm argues that in our case the claimants had not "bargained away" their rights to privacy vis à vis Citadel, as they have not commenced an action or made a claim against Citadel. While I agree that the cases are different than ours, I think that the concept of the implied consent still applies. When a person makes a claim for accident benefits they agree to provide certain medical information that is collected and analyzed by the accident benefit insurer. Because of

section 275 of the Insurance Act, quoted above, there is, in specified situations, the statutory right of subrogation, or as it is referred to, "loss transfer". As this is specifically contemplated and allowed by the laws of Ontario, it is reasonable to assume that there is implied consent for release of the information, not only to the accident benefits carrier but also to the potentially ultimate payer, the loss transferee. I should emphasize, however, that the implied consent is only for the purpose of loss transfer, and for no other purpose. In this way the access to private information is minimized while still allowing the loss transfer system to operate effectively and efficiently.

(iv) Personal Health Information Protection Act ("PHIPA")

State Farm also argues that the provisions that PHIPA apply. The applicable sections of that Act are as follows:

> 1. The purposes of this Act are,
>
> (a) to establish rules for the collection, use and disclosure of personal health information about individuals but protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care;
>
> (b) to provide individuals with the right of access to personal health information about themselves, subject to limited and specific exceptions set out in this Act;
>
> (c) to provide individuals with a right to require the correction or amendment of personal health information about themselves subject to limited and specific exceptions as set out in this Act;
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> (d) to provide for an independent review and resolution of complaint with respect to personal health information; and

(e) to provide effective remedies for contraventions of this Act.

Section 7 (1)(b)(ii) provides that except if this Act or its regulations specifically provide otherwise, this Act applies to, . . . a person who is not a health information custodian and to whom a health information custodian disclosed the information, even if the person received the information before that day;

4(1) In this Act,

"personal health information" subject to subsection (3) and (4), means identifying information about an individual in oral and recorded form, if the information,

(a) related to the physical or mental health of the individual, including information that consists of the health history of the individual's family;

(b) relates to the providing of health care to the individual, including the identification as a person as provider of health care to the individual,

(c) is a plan of service within a meaning of the Long Term Care Act, 1994 for the individual,

(d) related to payments or eligibility for heath care in respect of the individual,

(e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(f) is the individual's health number or

(g) identifies an individual's, substitute decision maker

Section 18 (1) If this Act or any other Act requires the consent of an individual or the collection, use or disclosure of personal health information by a health information custodian, the consent,

(a) must be the consent of the individual;

(b) must be knowledgable;

(c) must relate to the information; and

(d) must not be obtained through deception or coercion

Section 18 (3) prohibits implied consent in certain circumstances. A consent to the disclosure of personal health information about an individual about an must be expressed, and not implied, if

(a) a health information custodian makes the disclosure to a person who is not a health information custodian;

Section 49 (1) except as permitted or required by law and subject to the exceptions and additional requirements, if any, that are prescribed, a person who is not a health information custodian and whom a health information custodian discloses personal health information, shall not use or disclose the information for any purpose other than,

(a) the purpose for which the custodian was authorized to disclose the information under this Act; or

(b) the purpose of carrying out a statutory or legal duty

(2) subject to the exception and additional requirements, if any, that are prescribed, a person who is not a health information custodian, and to whom a health information custodian discloses personal health information, shall not use or disclose more of the information that is reasonably necessary to

> meet the purpose of the use or disclosure, as the case may be, unless use or disclosure is required by law.

Citadel argues that the provisions of PHIPHA do not apply, as PHIPA does not apply to personal health information disclosed before November 1, 2004 and also because State Farm is not a "health information custodian" or "a person" as defined by the Act.

Dealing first with the timeframe to which the Act applies, I note that section 7 (b) (ii) states that the Act applies to the use or disclosure of personal health information, on or after the date this section comes into force (November 1, 2004) . . . (ii) a person who is not a health information custodian and to whom a health information custodian discloses the information, even if the person received the information before that date (November 1, 2004).

Thus, if a health information custodian provided the information to State Farm prior to November 1, 2004, and State Farm is not a health information custodian, then the Act applies.

The health information custodian is defined by section 3 of the Act:

> "subject to subsection (3) to (11) means a person or organization described in one of the following paragraphs with custody or control of personal heath information as a result of or in connection with performing the person's or organization's powers or duties or the work described in the paragraph, if any:
>
> 1. a health care practitioner or a person who operates a group practice of health care practitioners.
> 2. a service provider within the meaning of the Long Term Care Act, 1994 who provides a community service to which that Act applies.

3. a community care access corporation within the meaning of the Community Care Access Corporation Act, 2001.

4. a person who operates one of the following facilities, programs or services:

   (i) a hospital within the meaning of the Public Hospitals Act, a private hospital within the meaning of the Private Hospitals Act, a psychiatric facility within the meaning of the Mental Health Act, an institution within the meaning of the Mental Hospitals Act or an independent health facility within the meaning of the Independent Health Facilities Act

   (ii) an approved charitable home for the aged within the meaning of the Charitable Institutions Act, a placement coordinator described in subsection 9.6 (2) of that Act, a home or joint home within the meaning of the Homes for the Aged and Rest Homes Act, a placement coordinator described in subsection 18 (2) of that Act, a nursing home within the meaning of the Nursing Homes Act, a placement coordinator described in subsection 20.1 (2) of that Act, or a care home within the meaning of the Tenant Protection Act, 1979,

   (iii) a pharmacy within the meaning of part (vi) of the Drug and Pharmacies Regulations Act

   (iv) a laboratory or specimen collection centre as defined in section 5 of the Laboratory and Specimen Collection Centre Licensing Act

   (v) an ambulance service within the meaning of the Ambulance Act

(vi) a home or special care within the meaning of the Homes for Special Care Act

(vii) a centre, program or service for community health or mental health whose primary purpose is a provision of health care

5. an evaluator within the meaning of the Health Care Consent Act, 1996 or assessor within the meaning of the Substitute Decisions Act, 1992
6. a medical officer of health or board of health within the meaning of the Health Protection and Promotion Act
7. the minister, together with Ministry of the minister if the context so requires
8. another person described as a health information custodian if the person has custody or control of personal health information as a result of or in connection with performing prescribed powers, duties or work or any prescribed class of such persons.

It would appear that State Farm would therefore not fall within the definition of a health information custodian. Thus, in our situation, a health information custodian provided the information to a non-health information custodian (person) (State Farm), thus, it would seem that the Act does apply in terms of the timeframe, to our situation. We must then turn our attention to section 18 of the Act which states:

> A consent to the disclosure of personal health information about an individual must be expressed, and not applied, if,
>
> (a) a health information custodian makes the disclosure to a person that is not a health information custodian.

In our situation the disclosure in question is to be from State Farm, a "person" rather than a "health information custodian" to another "person", rather than a "health information custodian" (Citadel). As such, implied consent is acceptable. For reasons given above, there is implied consent in loss transfer cases. Thus State Farm is to provide the medical information to Citadel.

Even if the Act were to apply, and section 7 (1)(b)(ii) were to prohibit implied consent in our situation, section 9 (2)(9d) of the Act states that:

> Nothing in this Act shall be construed to interfere with . . . the power of a Court or tribunal to compel a witness to testify or to compel production of a document.

Accordingly, in the event that I am incorrect with regard to the applicability of PHIPA in this case, I would nevertheless order the medical records to be produced to Citadel.

While the parties have not argued the point, it may be that section 9 (2)(a) has some applicability to this matter, however, as it has not been raised, and is not necessary in order for me to reach my decision, I will not deal with it.

In the event that the parties are unable to agree with regard to the issue of costs, I may be spoken to.

Dated this _____ day of February, 2006.

_____

M. Guy Jones
Arbitrator