Translated from the original French

Social Affairs Section

In matters of compensation

Date: July 21, 2021

Neutral citation: 2021 QCTAQ 07450

File: SAS-M-238204-1506

Presiding Administrative Judge:

STÉPHANIE BOULIANNE

A. S.

Applicant

v.

SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC

Respondent

INCIDENTAL DECISION

**OVERVIEW**

1. As a preliminary matter, the Tribunal is asked to rule on the applicant’s motion to dismiss and to reject evidence comprising the surveillance report, the recording, and the physical surveillanceby the Société de l’assurance automobile du Québec (the Société).
2. During a case management conference, it was agreed to split the proceeding so that the Tribunal could first rule on the preliminary exception. This exception is part of the appellant’s contestation of a decision rendered by the Société on June 12, 2015, finding that no accident occurred on February 6, 2013, and claiming $57,847.63 in overpaid indemnities.
3. In support of its position on the merits, the Société filed an investigation and surveillance report that contains videos and the details of three additional investigations.
4. In her motion, the applicant asks the Tribunal to declare the investigation report dated July 24, 2014, its schedules and the additional investigation details inadmissible in evidence. She argues that this evidence infringes her right to privacy and her reputation, that it brings the administration of justice into disrepute because it was not initiated on rational and serious grounds, and that the investigation was not carried out through reasonable means.
5. In the alternative, if the Tribunal does not declare all of these documents inadmissible, she asks that it declare inadmissible the physical surveillance, the video surveillance, and the elements of the investigation that were obtained through the surveillance, that is, a portion of the statement made by the physiotherapist Martin Lussier.
6. For its part, the Société submits that there were sufficient rational grounds to justify the request for an investigation with physical surveillance and video surveillance, and accordingly, it seeks the dismissal of the applicant’s motion to dismiss and to reject evidence.
7. At the start of the hearing, the Tribunal was asked to rule on an objection raised by the Société based on the applicant’s late presentation of her motion to dismiss. The Société submits that it is a dilatory tactic, that the investigation has been in the record since 2014, and that the applicant should have presented her exception much earlier. It adds that counsel waived the right to present such a motion during the case management conference held on March 6, 2020, when she stated that she had no objection to the admissibility of the investigation.
8. Counsel for the applicant admits that it was in fact premature to answer that question during the case management conference held on March 6, 2020, but argues that this should not prevent her client from filing her motion in view of the subsequent change of direction the file took due to the change in counsel.
9. For the reasons expressed orally at the hearing, the Tribunal dismissed the objection. In short, the Tribunal is of the view that it would have been advisable for the applicant to announce the preliminary exception earlier. However, the Tribunal notes the change in counsel that resulted in the file taking a new direction and the additional investigation conducted by the Société that had a potential impact on the direction that the file would take.
10. The Tribunal notes that although the investigation report has been in the record since 2014 and that this preliminary exception was raised only much later, the Société has not been taken by surprise to the point that this would infringe its rights, as the exception has been announced for several months and was provided to it in sufficient time before the hearing (in January 2021) such that it could respond.
11. The interests of justice require that the motion to dismiss be heard.

**ISSUES**

1. The Tribunal must therefore rule on the following two questions:
* Did a violation of privacy occur?
* If yes, could that violation bring the administration of justice into disrepute?
1. The Tribunal answers the first question in the affirmative and the second question in the negative. Here is why.

**ANALYSIS AND REASONS**

1. As set out in section 11 of the *Act respecting administrative justice*,[[1]](#footnote-1) the Tribunal rules on the admissibility of evidence and means of proof and may, for that purpose, follow the ordinary rules of evidence applicable in civil matters. It must, however, even of its own initiative, reject any evidence which was obtained under such circumstances that fundamental rights and freedoms are breached and the use of which could bring the administration of justice into disrepute.[[2]](#footnote-2)
2. First, it is appropriate to distinguish the investigation report *per se* from the surveillance.

**THE INVESTIGATION REPORT**

1. The investigation report dated July 22, 2014, includes the following elements:
* Reports of meetings with the owner of the damaged vehicle, the driver of the tow truck, the co-owner of [Company A], [Company B] (accountant’s office), the accountant of [Company C], the director of a mandatary of the Société (registration-transaction office), six clients of [Company D], the analysis of the automobile transactions related to [Company C], a conversation with a claims adjuster regarding another automobile accident involving the applicant, a telephone conversation with the owner of [Company E];
* A report of a meeting with the applicant on June 11, 2014;
* Searches conducted in the records of the enterprise register and the vehicle registration register, and the verification of a commercial address;
* Bank statements and other information obtained from the TD Bank;
* A meeting with another investigator of the Société regarding a towing incident and the applicant’s meeting [at Company C].
1. The investigation report contains the physical surveillance and video surveillance report by the investigation firm Gardium (schedule 12). This part of the report will be addressed in the next section along with the report of the meeting with the physiotherapist commenting on the applicant’s conduct on the videos (schedule 20).
2. The additional investigation details of September 3, 2014, include the following:
* An accident scene reconstruction expert assessment;
* An account of the piano lessons that the applicant allegedly gave after the accident.
1. The additional investigation details of September 19, 2014, is made up of:
* A verification with the integrated traffic management centre of A for February 6, 2013.
1. The additional investigation details of November 11, 2019, concern:
* A validation of information – meeting with the witness of the accident to clarify certain aspects of her affidavit filed by the applicant on August 19, 2019.
1. In this respect, the *Act respecting the Société de l'assurance automobile du Québec*[[3]](#footnote-3) gives the Société, itself or through a person it designates, the power to inquire into any matter within its jurisdiction. For such purposes, the Société and any person it designates have the powers and immunities of commissioners appointed under the *Act respecting public inquiry commissions*,[[4]](#footnote-4) except the power to impose imprisonment.
2. It is therefore perfectly legitimate, reasonable, and even advisable for the Société to obtain documents, information, or an expert assessment, to verify the facts and clarify a claim file.
3. The Tribunal is of the view that no fundamental rights were breached by this portion of the Société’s evidence. That goes without saying with respect to obtaining the various documents, but also with respect to the Société’s investigator’s questioning of the owners and employees of the companies concerned, the accountant, the therapist, and the clients of the businesses concerned. There is no violation of privacy here, nor any infringement of dignity, honour, or reputation. Although the applicant invokes such infringement, she did not establish it or anything beyond the inconvenience or annoyance of having persons in her circle questioned on subjects concerning her.
4. In conclusion, in the context of an application for an indemnity filed by the applicant, the Société was justified in pursuing its investigation further, and the Tribunal finds that the investigation report described above and the additional investigation details are admissible in evidence.

**THE SURVEILLANCE**

1. The Tribunal must now determine whether the physical surveillance, the video surveillance, and the portion of the statement made by the applicant’s physiotherapist commenting on the video are admissible.

**DID A VIOLATION OF PRIVACY OCCUR?**

1. Recall that according to the principles established by the Court of Appeal in *Bridgestone*,[[5]](#footnote-5) the leading case on surveillance, these means of proof may constitute an infringement of privacy.[[6]](#footnote-6)
2. However, despite this apparent infringement of the right to privacy, the Court of Appeal found that surveillance evidence is admitted if it is justified on rational grounds and carried out through reasonable means. Such rational grounds must exist before initiating the surveillance process, and the means used must not be abusive or infringe the dignity of the person concerned.[[7]](#footnote-7)
3. Regarding the meaning of reasonable and serious grounds to which the Court of Appeals refers to in *Bridgestone*, it is useful to cite the words of François Tôth, J. of the Superior Court, who, in his 2009 judgment in *Ville de Sherbrooke c. Turcotte*,[[8]](#footnote-8) provided the following definition:

[translation]

[81] Not every suspicion will justify surveillance. The Court of Appeal refers to serious and reasonable grounds. Reasonable grounds are grounds that are based on reason rather than on bias, first impressions, received ideas, or mere rumours. They are grounds that may be objectivized. Serious grounds are grounds that denote importance, that are not minor, frivolous, or superficial.

[82] Thus, a superficial or sloppy investigation or surveillance that is nothing more than a fishing expedition will be judged harshly.

1. On the issue of privacy, *Hunter et al. v. Southam Inc.*, one of the first judgments rendered by the Supreme Court under the *Canadian Charter of Rights and Freedoms* stated that the right to privacy is a personal right, which protects “people, not places”.
2. Thus, the right to privacy applies whether a person is in a public or private place because “privacy is at the heart of liberty in a modern state”.
3. However, it is important to recognize that the right to privacy is not absolute.
4. That is what the Supreme Court stated in *R. v. Cole*:[[9]](#footnote-9)

Privacy is a matter of reasonable expectations.  An expectation of privacy will attract *Charter*protection if reasonable and informed people in the position of the accused would expect privacy*.*

1. Applied to the facts of this case, the applicant did not lose all expectation of privacy even though she was in the parking lot of her residence, in front of an elementary school, in the parking lot of a shopping centre, in her car on the road, outside at a flower shop, outside Hospital A, in a parking lot in front of [Company C], at the gas station, in the parking lot of [Company F], and in the parking lot of a medical and dental centre.
2. Clearly, the expectations are lower than if the places where the applicant was the subject of surveillance and was filmed had been private places, or even public places with restricted access. In such case, privacy expectations would and should have been higher.
3. In summary, there is no doubt that the information in the video recordings are related to the applicant’s privacy and that she had expectations in regard to her right to privacy, but these expectations were on the lower end of the scale.
4. This conclusion having been reached, the Tribunal must now determine whether this surveillance and the video recordings could bring the administration of justice into disrepute.

**COULD THE VIOLATION BRING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE?**

1. In support of her motion, the applicant submits that the Société had no serious, legitimate, and rational grounds to support its request for investigation and surveillance. She argues that such grounds must exist before they are authorized, not *a posteriori*, to avoid a [translation] “fishing expedition”.
2. Also, she notes that the Société did not comply with the principle that surveillance should be used only as a last resort. In this regard, she criticizes the Société for having favoured surveillance rather than meeting with her or having her reassessed by an expert.
3. Last, referring to the statutory provisions relevant to this dispute and to the criteria for the admissibility in evidence of surveillance that emerge from the case law on the subject, counsel for the applicant went over the evidence in the record that, in her view, is insufficient to warrant the investigation, physical surveillance, and video surveillance of her client.
4. In conclusion, she asks the Tribunal to exclude all the evidence obtained in violation of fundamental rights because its use could bring the administration of justice into disrepute.
5. For its part, the Société submits that the reasons supporting its request for surveillance must be taken as a whole, not individually, and that the context shows that it had reasonable grounds to investigate the applicant and place her under surveillance.
6. After analyzing all the evidence in the record and the arguments presented by the parties, the Tribunal finds that the physical surveillance and video surveillance must be declared admissible.
7. When it requested the investigation with surveillance, the Société was dealing with:
* An automobile accident without transportation by ambulance or a police report.
* A diagnosis of trivial mild craniocerebral trauma with a balance disorder (severity 4), which is a high level of severity, but without the symptoms being objectivized by various tests and professionals.
* The applicant’s apparent lack of cooperation, as reported by the nurse from Hospital A’s traumatology program, and the closing of the applicant’s file due to a lack of follow-up.
* The applicant’s apparent failure to follow through with her vestibular physiotherapy treatments.
* A medical note from Dr. Céline Jobin of the Hospital A neurology department noting that the applicant is very dissatisfied with her job and does not want to return. The same note states that there appears to be psychosomatic elements explaining the persistence of certain symptoms.
* Atypical progress of mild CCT.
* A comment of the CSA complaining that the applicant never calls back.
* A suspicious call on July 9, 2013, where, after leaving a message on the answering machine at home, the applicant’s husband answered her cellular phone and said that she would be at work in the afternoon, whereas she said she was unable to work at that time.
* An undeclared automobile accident.
1. All of the elements described above, when juxtaposed, were sufficient for the Société to seek and request surveillance for the purpose of identifying the true parameters of the dispute. The Tribunal is of the view that, taken together, there were sufficient elements to justify the Société’s doubt regarding the honesty of the applicant’s conduct. That decision was neither arbitrary, nor applied in a haphazard manner.
2. As for the criticism that the Société used the last resort of surveillance rather than have the applicant undergo an expert assessment, the Tribunal considers it legitimate not to have taken that approach, knowing that an expert assessment had already been conducted and that due to the persistent doubt as to the applicant’s credibility, recourse to surveillance was justified.
3. Moreover, the surveillance that the applicant was subjected to was not carried out continuously. It was limited in time and in the places where it took place. There was no intrusion into the applicant’s intimate life and activities.
4. The surveillance and video recordings took place while the applicant was headed to businesses, clinics, and the hospital open to the public, and in rather neutral circumstances, not during more personal activities or in places to which the public does not have access.
5. The Société’s evidence demonstrated the analysis it conducted before deciding to investigate with surveillance. That analysis took place in several steps, by several persons having various levels of responsibility.
6. The decision to place the applicant under surveillance was therefore reasonable, and the means and the places were as well. The Tribunal is of the view that a meeting with the applicant or an additional expert assessment would not have been sufficient to resolve the elements that raised doubts.
7. There is also no doubt that the evidence obtained by video surveillance is relevant to decide the principal dispute, that is, whether the applicant is entitled to benefits from the Société further to the automobile accident that left her with sequelae.
8. Of course, the panel that will be called on to decide the case on the merits will have ample opportunity to determine the probative value of the content of the video recordings, just like the applicant will be able to contest the value or weight to be ascribed to them, and she will have the opportunity to file her own evidence to contradict the content of those recordings.
9. The Tribunal finds that the manner of proceeding in this case satisfies the conditions established by the Court of Appeal in *Bridgestone*. The Société had rational grounds for requesting surveillance, and the surveillance was carried out in the least intrusive manner possible.
10. To conclude, the Tribunal adopts the remarks of Barbe, J. in *Lefort*:

[translation]

In this case, the Court is of the view that a reasonable person, who is objective and well informed of all the circumstances of the matter would find that the administration of justice would be brought into greater disrepute if the Court found that the defendant could not use this video cassette evidence, as compared with the inconvenience caused by its use in the truth-seeking process. In the circumstances, the Court, exercising its discretion, dismisses the plaintiff’s objection and authorizes the video evidence, for the sole purpose of seeking the truth.

1. Finally, the case law is consistent with respect to the rules on the admissibility of evidence, which must be applied in a more flexible manner before the Tribunal than before the courts of justice. The purpose of this flexibility is, above all, to foster the effective and pragmatic search for truth.

**FOR THESE REASONS, THE TRIBUNAL:**

**DISMISSES** the applicant’s motion to dismiss and to reject evidence;

**DECLARES** the investigation report, its schedules and additional investigation details as well as the video and audio recordings admissible; and

**REFERS** the file back to the secretariat of the Tribunal so that the parties may be convened to a new hearing.

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|  | STÉPHANIE BOULIANNE, a.j.t.a.q. |

Le Cabinet M

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1. CQLR, c. J-3. [↑](#footnote-ref-1)
2. See to the same effect, article 2858 of the *Civil Code of Québec*. [↑](#footnote-ref-2)
3. CQLR. c. S-11.011, sections 2 and 17.2. [↑](#footnote-ref-3)
4. CQLR. c. C-37. [↑](#footnote-ref-4)
5. *Syndicat des travailleurs (euses) de Bridgestone Firestone de Joliette (CSN) c. Trudeau*, 1999 CanLII 13295 (QC CA). [↑](#footnote-ref-5)
6. The relevant statutory provisions are sections 5 and 9.1 of the *Charter of human rights and freedoms* and articles 35 and 36 of the *Civil Code of Québec*. [↑](#footnote-ref-6)
7. Note 2 at 55 to 57. [↑](#footnote-ref-7)
8. 2009 QCCS 5757. [↑](#footnote-ref-8)
9. 2012 SCC 53, [2012] 3 S.C.R. 34 at para. 35. [↑](#footnote-ref-9)