IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended

AND IN THE MATTER OF a Loss Transfer Dispute between Insurers pursuant to section 275 of the Insurance Act, and Ontario Regulations 664 and 668/90 thereunder;

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant
(Respondent on Motion)

and

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA

Respondent
(Applicant on Motion)

REASONS FOR DECISION ON UNDERTAKINGS AND REFUSALS MOTION

Submissions in Writing

Counsel:

Katherine E. Kolnhofer and Damien Van Vroenhoven for the Applicant on Motion ("RSA")

Catherine Zingg for the Respondent on Motion ("Aviva")

SCOTT W. DENSEM: ARBITRATOR

Introduction and Background to the Motion

This undertakings and refusals motion arises in the context of a loss transfer arbitration regarding Statutory Accident Benefits ("SABS") paid to Blossom Gordon ("the claimant") pursuant to the *Insurance Act* following a March 24, 2017 accident. The SABS claim was originally adjusted by TTCICL (a department of the Toronto Transit Commission which deals with SABS claims). TTCICL commenced a Regulation 283/95 priority dispute against Aviva. TTCICL adjusted the claim and paid SABS to the claimant until the claim was mediated in March, 2021.

Aviva accepted priority for the claim from TTCICL and assumed responsibility for adjusting the claim before the mediation. Aviva reimbursed TTCICL for the SABS it had paid to the claimant to the date Aviva accepted priority. Aviva settled the claim at mediation for a total payment of $90,000. $70,000 was allocated to Income Replacement Benefits, and $20,000 was allocated to Medical and Rehabilitation Benefits.

Aviva served a Loss Transfer Request for Indemnity ("LTRI") on RSA in July, 2021. The LTRI seeks reimbursement for $122,471.03. This is the total SABS paid to the claimant.

RSA has accepted responsibility to indemnify Aviva in loss transfer. The issue in this arbitration is whether payments made by Aviva to reimburse TTCICL for SABS paid to the claimant up to the mediation, and the settlement amount paid to the claimant on settlement by Aviva, were reasonable.

As part of its inquiry into the reasonableness of the payments, RSA conducted an examination under oath of an Aviva representative, Peter Mandyam. Mr. Mandyam was

not the representative of Aviva who attended the mediation and completed the settlement of the claim. This representative was Percy Laryea. Mr. Laryea left Aviva sometime after the mediation. Mr. Mandyam was assigned the claim upon Mr. Laryea's departure. Mr. Mandyam had no direct involvement in the adjustment and settlement of the SABS claim.

The Undertakings and Refusals

According to RSA's submissions, the following undertakings and refusals were made on the examination under oath of Mr. Mandyam on March 8, 2022 (question and page references refer to the transcript of Mr. Mandyam's examination, Tab 2, Document Brief of RSA).

1. To provide a copy of the transcript of the claimant's examination under oath (Q. 39, p. 12).

Aviva's submissions indicate that this undertaking has been satisfied as of October 20, 2023 (para. 12, p. 2).

2. To provide any notes of calculations regarding exposure for the SABS claim and for the settlement figure negotiated at mediation. (Q. 63, p. 19, Q. 65, p. 20).

Aviva's submissions indicate that this undertaking was satisfied as of October 31, 2023 (para. 12, p. 2).

3. To advise of any further grounds for the insurer's examination report of Dr. Debow not being filed as evidence for the claimant's pending Licencing Appeal Tribunal ("LAT") hearing (Q. 109, pp. 31, 32).

Aviva's submissions do not specifically address this request. From my review of the transcript however, a substantive answer was provided to this inquiry at Mr. Mandyam's examination. Counsel for Aviva advised as follows:

> There was correspondence from – I believe it was McCarthy Tetrault, who was representing Dr. Debow, saying that he would no longer be able to be qualified as an expert, as he was retired, and that he would not be appearing at any hearings (p. 31).

Counsel for RSA observed, quite appropriately I think, as follows:

> …there would be some concerns about how the evidence of Debow would be martialed, in any event, so there's exposure at least from that perspective…(p.32).

This comment recognizes that if Dr. Debow could not be produced for cross examination on his report, then the report would probably not be admissible. This would increase Aviva's risk of not being successful at a LAT hearing.

For the sake of completeness however, Aviva should confirm whether there are any other reasons other than those stated on the examination of Mr. Mandyam as to why the report of Dr. Debow was not filed for the pending LAT hearing.

4. To provide any further particulars as to why the s. 25 IRB assessments were partially approved in the amount of $14,158.00 (Q. 123, p. 35).

Aviva's submissions do not address this request. It is a relevant question. These assessments were approved by TTCICL and paid as a Medical and Rehabilitation expense at the same time IRBs were being reinstated. Aviva reimbursed TTCICL for this expense after it accepted priority. They are part of Aviva's LTRI. If there are particulars of

which Aviva is aware as to why TTCICL approved these assessments Aviva should provide them. If there are no particulars which Aviva can provide as to why these assessments were approved by TTCICL then Aviva should confirm this.

5. To provide a copy of any document requesting settlement authority before the settlement of the claimant's SABS claim at mediation (Q. 79, p. 23).

As pointed out in RSA's submissions, this request was initially refused, then taken under advisement. According to Aviva's submissions however (para. 12, p. 2), on October 31, 2023, Aviva provided RSA with a copy of the Settlement Authority Request submitted by Percy Laryea in advance of the mediation.

6. To provide an unredacted copy of the legal opinion of Aviva's legal counsel, Flaherty McCarthy, relied upon by Aviva in determining the settlement value of the claimant's SABS claim (Q. 59, p. 18, Q. 60 – 62, p. 19).

This request was refused by Aviva on Mr. Mandyam's examination, and Aviva has maintained that refusal on the basis that this opinion is protected by solicitor – client privilege. RSA maintains that Aviva has impliedly waived the privilege.

Analysis

To deal with the issue raised in item 6. above requires a detailed examination of the law.

I will begin with a statement of the law applicable to the permissible extent of review by the indemnifying insurer (in this case – RSA) of the claims handling decisions by the indemnity seeking insurer (in this case – Aviva) in loss transfer matters.

Subject to the provisions of s. 275 of the *Insurance Act,* and ss. 9 of Regulation 664, RSA is required to indemnify Aviva for SABS payments it has made to the claimant (including those payments reimbursed to TTCICL) provided such payments were "reasonable".

The permissible extent of the inquiry regarding the reasonableness of payments is restricted to confirming that Aviva did not:

1) act in bad faith;

2) make payments that were not covered under the SABS in existence at the time of the loss i.e. pay for a weekly benefit when there were no such entitlement, or;

3) in general, so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler. (*Commercial Union Assurance v. Boreal Property & Casualty Co.* (December 21, 1998, Arbitrator Samworth).

In my view, the law respecting the scope of review of the reasonableness of payments requires RSA to establish that Aviva either acted in bad faith, or was so negligent in making some or all of the payments that payments were made where there was no SABS entitlement, or amounts greatly in excess of entitlement were paid.

Unless Aviva acted in bad faith, or was negligent to the extent described, RSA cannot challenge the reasonableness of Aviva's payments by seeking to substitute a different decision making process for Aviva's, or by showing simply that Aviva paid more than RSA would have paid had it have been adjusting the claim.

I would say that the standard of review of the reasonableness of payments in loss transfer indemnity claims is similar to the standard applied by a Court of Appeal reviewing a trial judge's decision. Provided that the trial judge did not misapprehend the evidence, or make an error of law, the Court of Appeal must give deference to the trial judge's decision even if the Court of Appeal may have come to a different conclusion.

I will now turn to the law regarding solicitor-client privilege.

The sanctity of solicitor-client privilege was made clear by the Supreme Court of Canada in *R. v. McClure*, 2001 SCC 14, and in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31.

Solicitor-client privilege *"…must be as close to absolute as possible to ensure public confidence and retain relevance. As such it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."* (*R. v. McClure*, para 35).

Solicitor-client privilege is *"…part of and fundamental to the Canadian legal system…[I]t has evolved into a fundamental and substantive rule of law."* (*R. v. McClure*, para. 17).

Communications protected by privilege should be disclosed only where *"absolutely necessary"*, applying *"…as restrictive a test as may be formulated short of an absolute prohibition in every case".* (*Goodis v. Ontario*, paras 20-21).

A very helpful discussion of the solicitor-client privilege issue relevant for this case is contained in Justice Corbett's decision in *Guelph (City) v. Super Blue Box Recycling Corp.* [2004] O.J. No. 4468, S.C.J. ("*Guelph v. Super Blue Box*").

The issue before the Court in *Guelph v. Super Blue Box* was the same as the issue before me - whether Guelph was required to disclose certain communications between itself and its solicitors which Guelph relied on for its position in the lawsuit.

As a starting point, the Court adopts the following statement originating from Wigmore (*8 Wigmore Evidence – McNaughton Rev. 1961*, p. 554) (para. 76 (c), p. 35):

> Where legal advice of any kind is sought from a professional legal advisor in [his or her] capacity as such, the communications relating to the purpose made in confidence by the client are at [its] first instance permanently protected from disclosures by [the client] or by the legal advisor; except that the protection can be waived.

The Court confirms that once it has been established that a communication is subject to solicitor client privilege, the onus is on the party seeking to compel disclosure to establish that the communication ought to be compelled (para 76 (f), p. 36).

The Court goes on to consider what does, and what does not constitute waiver of solicitor-client privilege. The court carefully explains that a party may disclose that it obtained and relied upon legal advice without being deemed to have waived privilege over solicitor-client communications.

> In my view, mere disclosure of the receipt and reliance upon legal advice, in the discovery process, is not sufficient to give rise to waiver of privilege. Where the reliance on the legal advice will be relied upon at trial in respect to a substantive issue

between the parties, that is another matter. That is covered by “waiver by reliance”. But mere disclosure, by itself, that legal advice was received and followed to explain why a party did something should not be sufficient, by itself, for a waiver of privilege (para. 87).

The Court then explains what is meant by “waiver by reliance”.

…In most commercial disputes the intention of the parties should be irrelevant. Where a party relies upon legal advice in the performance of a legal obligation, it is generally no defence to a claim for breach of that obligation that the breachor was following legal advice. The question is: did the breachor breach? If yes, then what are the damages?

…Most claims in a commercial law context will have little or nothing to do with what the parties intended or felt, but rather with what they were obliged to do, and what they did in fact. However, in many of these cases allegations will be made on the basis of theories of liability tied to intention or motive…allegations of lack of good faith, intentional breach of obligation, and/or bad faith will be made more often than such allegations are made out at trial. And when such allegations are made, then the state of mind of the parties, the reasons <u>why</u> they did things will be in issue.

…Privilege can be claimed regardless of the opposite party’s allegations. However, when faced with a claim of bad faith, a party that responds by relying on good faith conduct as a result of following legal advice will thereby waive its privilege: *Sovereign General Insurance Co. v. Tanar Industries* [2002] A.J. No. 107; where a party attempts to justify its position “on the grounds of detrimental reliance upon legal advice received,” it waives privilege associated with that legal advice: *Davies v. American*

Home Assurance Co. (2002), 60 O.R. (3d) 512 (Div. Ct.) ("*Davies v. American Home*"). (Paras. 93, 95, 97).

A cursory review of the foregoing law might lead one to conclude that an allegation of bad faith conduct met with a response of good faith conduct automatically compels the disclosure of otherwise privileged solicitor-client communications.

This conclusion would be wrong however, as *Guelph v. Super Blue Box* and *Davies v. American Home* confirm. The Court in *Guelph v. Super Blue Box* references *Davies v. American Home* in its analysis. It concludes that regardless of pleadings of bad faith or good faith, unless Guelph chose to actively assert at trial as a defence to the bad faith allegation the fact that it had obtained and relied upon legal advice as evidence of its good faith, it would not have waived privilege over that advice.

> …[I]t is irrelevant whether Guelph received and followed legal advice on these issues. It is only to the extent that Guelph relies upon the fact that it received legal advice on these topics to establish its good faith that privilege will be waived on the basis of reliance. Mere disclosure that legal advice was received on the topic, by itself, does not give rise to waiver on the subject matter at hand….The fact that [the legal department] was fully involved in the "process" establishes relevance, but not a waiver of privilege. The fact that legal advice was sought, obtained and relied upon, as a matter of fact, is not sufficient to give rise to waiver….(para 101).

In *Davies v. American Home*, the Divisional Court reversed a ruling made by a motions Judge holding that American Home was obliged to disclose the legal opinions it had sought and relied upon because the plaintiff had alleged that American Home had acted in bad faith in handling his claim.

The Court held:

> …I do not agree, however, that…the legal opinion of the solicitor upon which the insurer may have acted is producible simply because its contents may be relevant and the plaintiff is asserting a bad faith insurance claim.
>
> …As a general rule, a displacement of legal advice privilege otherwise recognized to exist, cannot be forced on the party seeking to maintain the privilege for example by responses to interrogatories (*Gower v. Tolko Manitoba Ltd.* – citation omitted) or in answers in cross-examination (*Campbell and Shinrose v. The Queen* - citation omitted).
>
> …the fact that an insurer has sought and obtained a legal opinion for the purposes of assessing its liability to respond to an insured's claim, and presumably has considered that opinion in deciding what to do, is not sufficient, in and of itself to render the legal opinion producible in litigation – even "bad faith" litigation – at the instance of that insured…the assertion of a bad faith claim…does not…change the analysis as to what is or is not protected by solicitor-client privilege…
>
> …the point is that litigation privilege (or solicitor-client privilege), when properly asserted, trumps relevance in almost all circumstances…There is no "bad faith insurance claim" exception to…solicitor-client privilege that creates a special rule for bad faith claims against insurers and consigns the normal rules respecting privilege to other claims. The same rules apply in all cases. (paras. 24, 26, 27, 44).

The issue of waiver of solicitor-client privilege was addressed by Justice Perell in *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 ("*Creative Career v. Ontario*"). The facts of this case were very similar to *Guelph v. Blue Box*, and Justice Perell's

analysis of the issue aligned with Justice Corbett's analysis in *Guelph v. Blue Box* (see para 31).

In *Creative Career v. Ontario*, Creative Career alleged (amongst other things) that the Ministry of Training Colleges and Universities ("the Ministry") acted negligently and in bad faith in their dealings with Creative Career. At discovery, the Ministry representatives testified that they had received and relied upon legal advice in formulating the Ministry's position *vis a vis* Creative Career. The Ministry representatives provided information about the factual background for the legal advice, but refused to disclose the substance of the advice.

The Master ruled that solicitor-client privilege had been waived. Justice Perell reversed this decision, ruling that solicitor-client privilege had not been waived.

Justice Perell notes that Creative Career pleaded that the Ministry acted in bad faith in refusing to register various private career colleges, and that the Ministry responded to this by pleading it acted in good faith in accordance with the law and pursuant to its statutory duty. The Ministry did not assert however, that the fact it had obtained and relied on legal advice was evidence in and of itself that it acted in good faith.

> …there is no waiver of the privilege associated with lawyer and client communications from the mere fact that during the events giving rise to the claim or defence, the party received legal advice, even if the party relied on the legal advice during the events giving rise to the claim or defence. For a party to have to disclose the legal advice more is required…it is not enough to constitute waiver that a pleading puts a party's state of mind in issue and that its state of mind might have been influenced by legal advice, there must be the further element that the state of mind

> involves the party understanding its legal position in a way that is material to the lawsuit. In other words, the presence or absence of legal advice itself must be material to the claims or defence to the lawsuit. (paras. 27, 28)

In applying the law to the facts in Creative Career v. Ontario, Justice Perell stated as follows:

> The fact that the Defendants had received legal advice about whether the Plaintiffs owned or controlled the private career colleges for which they sought registration was not relevant to the issue of whether the Plaintiffs did own or control these private career colleges. Similarly, it is irrelevant to the lawsuit that the Plaintiffs may have obtained legal advice to support their assertion that they owned the private career colleges. Ultimately, the court will decide the ownership issue based on facts that do not include either party's lawyer's legal opinion about ownership… I will borrow what Justice Corbett said in (*Guelph v. Blue Box*). It is only to the extent that the Defendants rely upon the fact that they received legal advice to establish their good faith that privilege will be waived on the basis of that reliance…

I have been referred by RSA to some decisions by Arbitrators Novick and Bialkowski as authority for the proposition that a party puts it "state of mind" in issue if it discloses that it has received and relied upon legal advice in coming to a decision on the settlement value of a claim, and therefore waives privilege over the legal advice.

I have summarized the law respecting solicitor-client privilege and waiver of same as laid down by the courts. These statements of the law are binding on me, and indeed, any arbitrator, so I find it unnecessary to review the arbitration decisions in any detail. I will be guided by the law as stated by the courts in coming to my conclusion.

I do not agree with RSA's characterization of the law on the issue of waiver of solicitor-client privilege. It does not accord with the interpretation of the law as discussed in the cases which I have reviewed. In my opinion, the cases I have reviewed are very clear that a party who discloses that it has received and relied upon legal advice in evaluating its position on the merits of a claim does not waive solicitor client privilege. It will only do so as waiver by reliance if it responds to an allegation of bad faith conduct by asserting, as evidence of its good faith, that it obtained and relied upon legal advice.

As Justice Perell states in *Creative Career v. Ontario*, this is the *"subtle and profound point"* (at para. 27) in understanding when disclosure of receipt and reliance on legal advice results in waiver of solicitor-client privilege and when it does not.

It is easier to illustrate this point by applying the law to the facts of the case before me. This is an arbitration of a loss transfer claim for indemnity advanced by Aviva against RSA. There are no pleadings in the traditional sense. The claim is commenced first by serving a Loss Transfer Claim for Indemnity, and then the arbitration is commenced with a Notice of Arbitration.

The arbitration proceeds with the parties conducting interlocutory proceedings such as the exchange of relevant documents and examinations under oath as a form of discovery. There are also pre-hearing conferences presided over by the Arbitrator where the parties and the Arbitrator discuss the issues and formulate a plan to move the matter to an arbitration hearing, should it be necessary.

In this case, the interlocutory proceedings and pre-hearing conferences have focused on whether the quantum of payments for which Aviva is seeking indemnification

from RSA were reasonable – i.e. not made negligently or greatly exceeding applicable SABS entitlement.

RSA has not alleged that Aviva acted in bad faith in making SABS payments. There has been no suggestion so far that Aviva had any improper motivation in making the payments, that it was recklessly indifferent in making the payments, or any similar allegation that might amount to bad faith conduct on Aviva's part.

Consequently, it has not been necessary for Aviva to defend itself against any allegations of bad faith.

The questions asked on the examination under oath of Aviva's representative which elicited the response that Aviva had received and relied on legal advice were focused on obtaining information about how Aviva arrived at its conclusions on the appropriate settlement value for the claim. In other words, the questions were directed at trying to determine whether the quantum of the payments made by Aviva were reasonable.

The following excerpt sets out the important exchange on this issue on the examination under oath of the Aviva representative:

> 57. Q. (By RSA's counsel) Okay. Let's talk about the amounts that were agreed to have been paid. So, let's discuss that 70,000 dollar figure for IRBs. Do you know how Aviva came to that figure?
>
> A. (By Aviva's representative) I believe its based on our PV (present value) of the file and the legal opinions of counsel.

58. Q. (By RSA's Counsel) Okay.

A. (By Aviva's representative) Based on risk.

59. Q. (By RSA's counsel) Did Aviva rely on legal opinions in coming to that determination of the settlement value?

A. (By Aviva's representative) Correct.

Q. (By RSA's counsel) Okay. And, Catherine (Aviva's counsel), can you provide a copy of the legal opinions that were relied upon for the settlement calculation, or settlement recommendation?

A. (By Aviva's counsel) I'll refuse that as privileged.

The case law I have reviewed makes it clear that there is no waiver by reliance of solicitor client privilege simply because Aviva disclosed in response to questioning on an interlocutory examination that it received and relied on legal advice in formulating its position on the value of the claim.

As Justice Perell reasons in *Creative Career v. Ontario*, the opinions Aviva obtained from its counsel as to the appropriate settlement value of the claim are not determinative of the issue before me. The same is true of any opinions RSA may have obtained from its counsel as to the appropriate value of the claim.

Whether the quantum of the payments made by Aviva for SABS and for which they seek indemnification in this proceeding were reasonable is the issue which the Arbitrator must decide based on the source evidence associated with those payments. Some examples of this evidence are itemized in paragraph 16 of Aviva's submissions.

RSA could tender evidence at the arbitration hearing attempting to establish that Aviva acted in bad faith in making some or all of the SABS payments for which Aviva seeks indemnification. Aviva may choose how it wishes to defend a bad faith allegation. It may assert that it acted in good faith in several ways without waiving privilege over legal advice it received and relied upon. It is only if Aviva defends the bad faith allegation by asserting as evidence of its good faith that it obtained and relied on legal advice would solicitor-client privilege be waived by reliance.

Conclusion and Disposition

Aviva should provide answers to undertaking 3 (see p. 3) and undertaking 4 (see p. 4) within 30 days hereof.

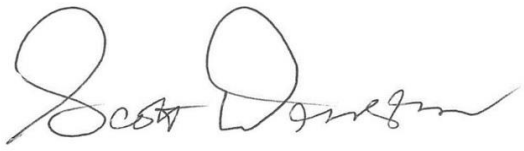
With respect to the refusal (see item 6, p. 5) by Aviva to produce the legal opinion(s) sought by RSA, for the reasons outlined, Aviva is not required to produce those legal opinions.

The substantial reason this motion was argued concerns RSA's request for production of Aviva's legal opinion(s), and the issue of whether solicitor-client privilege has been waived. Most of the parties' written submissions, and all the authorities submitted by the parties dealt with this issue. The majority of my decision concerns this issue. The two outstanding undertakings for which I have directed Aviva to provide answers likely could have been resolved by discussions between counsel or, if necessary, at a brief pre-hearing conference with counsel and the Arbitrator.

Aviva was successful on the substantive issue on the motion. I find Aviva entitled to recover its costs of the motion from RSA in any event of the cause. If the parties cannot

agree on costs for the motion, subject to the parties wishes, I would propose dealing with them at the conclusion of the arbitration.

February 12, 2024



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Arbitrator
Scott W. Densem