IN THE MATTER OF AN APPICATION UNDER THE *INSURANCE ACT*, R.S.O. 1990, C.18, AND SECTION 275 AS AMENDED, AND ALL REGULATIONS THERETO; AND IN PARTIULAR, ONTARIO REGULATION R.R.O. 1990, REG, 668 AS AMENDED

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, C.1.7. AS AMENDED

BETWEEN:

AVIVA CANDA INC.

Applicant

-and-

WESTERN ASSURANCE COMPANY

Respondent

DECISION ON REQUEST FOR EXAMINATION UNDER OATH

COUNSEL:

Amiee M. Draper for the Applicant

Derek Greenside for the Respondent

This matter arises out of a motor vehicle accident that occurred on April 19, 2012. At that time a motorcycle driven by Mr. Brian Wood and insured by Aviva Canada Inc. (Aviva) collided with a vehicle insured by Western Assurance Company (Western). Aviva paid accident benefits to and on behalf of Mr. Wood, and ultimately entered into a full and final settlement with Mr. Wood for all his accident benefits, on April 30th, 2019. Pursuant to the loss transfer provisions as set out in the Insurance Act of Ontario and Ont. Regulation R. R. O. 1990, Reg. 668, Aviva claimed loss

transfer against Western for both the monies paid out over the life of the claim as well as those monies paid out in the full and final settlement. While agreeing that loss transfer applies to this case, the parties are not in agreement as to the amount that should properly be paid by Western to Aviva and therefore this arbitration was commenced. On July 30th, 2019 I issues an order for production of various documents by Aviva in order that Western might assess what amount of the payments made should be reimbursed to Aviva. Aviva subsequently provided various documents to Western. At a teleconference pre-hearing held on December 3, 2019, after hearing submissions I ordered that Aviva produce their adjuster's log notes in this matter from January 1st, 2019 up to and including the date of the settlement, subject to any claim for privilege. Counsel then provided those notes but redacted that information for which privilege was claimed. As a result, counsel for Western at a teleconference prehearing held on February 13th, 2020 requested an examination under oath of the Aviva adjuster that handled the file in order to determine how the amount paid was arrived at and the factors that went into these decisions. After hearing oral submissions, I agreed to a request by counsel for written submissions, which I have now received.

Counsel for Western takes the position that an examination under oath of the Aviva adjuster is necessary in order to determine whether Aviva took all information into account which was or could have been available to them at the time of the settlement of the accident benefit claim and whether Aviva should have taken the time to obtain further information before settling the matter.

Counsel for Aviva takes the position that the decision made to make the payments and the final settlement were made on the basis of the various medical reports and documents and notes that have been produced and that anything further is subject to "settlement privilege" and therefore not producible.

The question then before me is whether to allow the Aviva claims representative to be questioned under oath as to how the calculation of the monies paid were arrived at and what factors and documents were taken into account in deciding on the amount of money that was ultimately paid.

In order to answer this question, it is necessary to briefly review the law as it relates to settlement privilege.

There is little doubt but that written and oral communications in furtherance of a litigious dispute are subject to privilege. At common law the courts have distinguished what are commonly referred to as class privileges and case-by-case privileges. A class privilege entails as presumption of nondisclosure once the conditions for its application are met. Class privilege is more rigid than a privilege constituted on a case-by-case basis (see Lizotte v Aviva Insurance Company of Canada, [2016] S.C.R. 52, paragraphs 32-34).

The documentation and information sought, if privileged, would undoubtedly fall into the area of class privilege. The Supreme Court of Canada in Sable Offshore Energy v Ameron International

et al. [2013] 2 S.C.R. 623 made it clear that settlement privilege falls into the "class privilege" category and is therefore, as noted above, more rigid than the case-by-case situation.

As Justice Abella, in Sable stated at paragraph 2 of her decision:

> "The purpose of settlement privilege is to promote settlement. The privilege wraps a protective vail around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible."

The court went on to state at paragraph 12 of its decision:

> "Settlement privilege promotes settlements. As the weight of the jurisdiction confirms, it is a class privilege. As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found when the justice of the case requires it."

In Inter-Leasing Inc. v Ontario (Finance), 2009, Can LII 63593 (ONSCDC), a case sited by both parties, the Ontario Divisional Court listed three conditions that must be present for settlement privilege to apply:

> "1. A litigious dispute must be in existence or within contemplation;
>
> 2. The communication must be made with the expressed or implied intention that it would not be disclosed in a legal proceeding in the event that negotiations failed;
>
> 3. The purpose of the communication must be to attempt to effect a settlement."

Counsel for Western submits that there is no evidence for me that there was an expressed or implied intention that they would not be disclosed in another legal proceeding. He further

submits that the Inter-Leasing case (supra) can be distinguished in that, in that matter, there was no settlement whereas in our case there was a settlement.

While I agree that there is an obvious difference between a settlement discussion that settles and one that does not, I am not convinced that it necessarily, in all cases, makes a difference with regard to whether the settlement privilege remains in place or not. Madam Justice Abella, in Sable made it clear that settlement privilege can apply whether there is a settlement or not (see paragraph 15-17).

On a somewhat related issue, it is worth noting that Supreme Court, in Lizotte, (supra) held that litigation privilege was a class privilege and could be asserted against third parties. While we are dealing with settlement privilege rather than litigation privilege, I accept that it is possible that settlement privilege could also apply to a third party and thus it is not determinative in our case that the settlement discussions were in a separate, albeit related, case.

With regard to the issue whether there was an expressed or implied intention that it would not be disclosed in a legal proceeding in the event negotiations fail, it does not appear that there was anything expressed in this regard. In terms of an implied intention not to disclose, the evidence is less clear. It would appear that there was a mediation, which is normally understood to be confidential, and that a final settlement was achieved. For the purposes of my decision, I do not think it is necessary to determine if there was an implied undertaking for confidentially. Clearly, if there was no such understanding, then the criteria as set out in Inter-Leasing (supra) would not be met and there would be no settlement privilege to apply. In this case, however, even if there

was such intent, as it would appear there would be, I do not think that the settlement privilege would apply.

In Sable (supra), the court was dealing with a situation where the plaintiff was suing a number of parties and during the course of the litigation, entered into settlement negotiations and eventually settled with some but not all of the parties, subject to a "Perringer" agreement. The non-settling parties requested that they be provided with the amount of the settlement entered into by the settling defendants. In ruling that the amount of the settlement be released, Justice Abella, when deciding the issue of settlement privilege, stated:

> "There are, inevitably, exceptions to the privilege. To come within these exceptions, a defendant must show that, on balance, 'a competing public interest outweighs the public interest in encouraging settlement'... These countervailing interests have been found to include allegations of misrepresentation, fraud, or undue influence... and preventing a plaintiff from being overcompensated."

Counsel for Aviva submits that the "balancing act" approach referred to by Madam Justice Abella to decide if disclosure is appropriate in settlement privilege cases is no longer the correct law in light of the decision of the Supreme Court of Canada in Lizotte (supra).

In that case, Mr. Justice Gascon was dealing with a matter where a claims adjuster was dealing with a fire loss claim. A complaint was made to the governing Quebec authority that the adjuster had mishandled the claim. The governing body began an inquiry and demanded certain documents from the insurer. The insurer provided some but not all, claiming that some were protected by solicitor-client or litigation privilege. While a lawsuit was brought by the owner of the property, this was eventually settled however the governing authority pressed on for

disclosure of the documents. To a certain extent this case relied upon the particular wording of the relevant Quebec legislation, but the court also reviewed the law as it relates to solicitor-client and litigation privilege.

In its decision, the court noted:

> "From this perspective, litigation privilege is similar to settlement privilege... which the court has already characterised as class privilege..."
> It cited its own decision in Sable (supra). As there was a prima facie presumption of inadmissibility. The court went on to note, however, there would be immunity from disclosure "unless the case is one to which one of the exceptions applies".

In Lizotte Mr. Justice Gascon rejected the case by case approach of balancing the advantages of applying the privilege. Rather, the court held that there were specific exceptions to litigation privilege rather than case by case exemptions. While the court cited some exceptions, it also stated at paragraph 42:

> "Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances."

As I understand counsel for Aviva's position, it would mean that the approach taken by the Supreme Court in Sable (supra) was essentially no longer valid given the decision of that court in Lizotte (supra) made some three years later. This was certainly not explicitly stated by the court in Lizotte (supra) and I note that the composition of the court was largely the same and the justice who wrote the decision in Sable (supra) was also in agreement with the decision Lizotte (supra).

When examining our case, I am of the view that while the prima facie settlement privilege applies, the facts of our case fit into what I find to be an exception to the general rule. I find support for this finding in the comments of the Madame Justice Abella in Sable (supra), a settlement privilege as opposed to litigation privilege case, when she found that one of the factors to be considered was preventing a plaintiff being overcompensated (see paragraph 19).

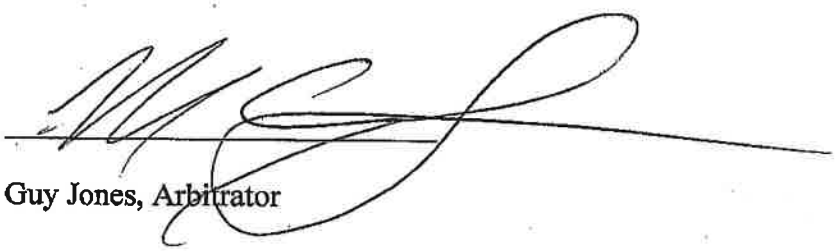
I also note that reference was made to the Ontario Divisional Court decision in Inter-Leasing (supra). In that case in addition to setting out the test for settlement privilege, the court found, on the facts of that case, that the documents were privileged. In doing so, however, the court noted that the facts before it were different than in the Dos Santos (Committee of) v Sun Life Assurance Company of Canada, [2005 B.C.J. No. 5] (B.C.C.A.) where settlement discussions were disclosed in order to protect a third party against excessive compensation and the privilege was held not to apply.

In our case, we have an insurer who settled an accident benefit case on certain terms and is properly seeking compensation from another insurer pursuant to the loss transfer provisions that exist in the Province of Ontario. Under loss transfer, the company ultimately paying is only responsible for the cost of benefits that were or would become reasonably payable in all the circumstances. A large lump sum payment was made on October 30th, 2019. In order to determine if those payments were reasonable in all these circumstances, the party ultimately paying is entitled not only to the medical and other reports already provided but also information as to what other factors may have been entered into the decision to arrive at the final settlement. This would include what investigations were undertaken and what information was potentially

available to the insurer who made the payment at the time of the settlement. Accordingly, I find that the applicant must provide the respondent the opportunity to examine under oath the claims representative that was responsible for concluding the final settlement agreement between the applicant and Mr. Wood. Such examination is to cover the subjects mentioned above. The respondent is not entitled to ask questions of the applicant regarding any strategies and discussions as to how handle or proceed with its claim for loss transfer against the respondent.

I will defer any ruling as to the costs of this motion until the resolution of the entire matter.

Dated at Toronto this 30th day of March, 2020.



Guy Jones, Arbitrator