IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, SECTIONS 268 and 275, REGULATION 283/95 and REGULATION 664, as amended

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

- and -

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

Respondent

DECISION ON A PRELIMINARY ISSUE (#2)

COUNSEL:

Eric K. Grossman for the Applicant

Sandi J. Smith for the Respondent

PRELIMINARY ISSUE:

1. Has privilege been waived over the legal opinions obtained by ING and either referred to at the examination under oath of its representative, or requested by counsel for ICBC ?

RESULT:

1. No. The legal opinions referred to by the witness and requested to be produced are protected by solicitor-client privilege, and that privilege has not been waived.

BACKGROUND:

Gary Kregar and Bonnie Begin were injured when the truck in which they were occupants was involved in a single-vehicle accident near Sudbury, Ontario on August 25, 2005. Mr. Kregar and Ms. Begin were spouses, and regularly drove large tractor-trailers between Toronto and Vancouver to deliver goods. Ms. Begin was driving at the time of the accident. Mr. Kregar sustained serious injuries in the accident, and ultimately passed away in 2008.

Both Mr. Kregar and Ms. Begin applied to Nordique/ ING Insurance ("ING"), the insurer of their personal vehicle, for accident benefits. The truck they were driving at the time of the accident was registered in British Columbia and insured by the Insurance Corporation of British Columbia ("ICBC"). ING paid benefits to Mr. Kregar until his death, and has paid benefits to Ms. Begin. It takes the position that ICBC is in higher priority to pay both claims pursuant to section 268(2) of the *Insurance Act*, and that it is entitled to indemnification from ICBC pursuant to the Loss Transfer provisions in section 275 of the *Act.*

Earlier on in the proceeding an issue arose with respect to whether ING had commenced arbitration with regard to Ms. Begin's claim in a timely manner. I determined, after a lengthy hearing, that they had. The parties were also involved in a WSIAT application brought under section 31 of that Act, to determine whether the Claimants were employees operating in the course of their employment at the time of the accident. The Tribunal determined that both Ms. Begin and Mr. Kregar were acting in the course of their employment, and were therefore not entitled to claim benefits pursuant to the *Statutory Accident Benefits Schedule*, but were obliged to seek payment under the WSIB scheme.

Counsel advised that a judicial review application of that decision has been dismissed. ING has received some funds from the WSIB in repayment of some of the benefits paid out, but a significant shortfall remains.

The issues relating to priority and loss transfer will now be arbitrated on July 24, 2012. Counsel for ICBC requested that Maddalena Panetta, a claims adjuster with ING who was involved in adjusting the file between December 2006 and December 2008, be examined under oath prior to the hearing. An examination was conducted on October 25, 2011. Ms. Panetta was not able to provide answers to some of the questions posed to her, and undertakings were given by her counsel to provide the information requested.

Counsel also refused to provide some of the information requested, consisting mainly of legal opinions requested by ING from the firm Zarek Taylor Grossman Hanrahan, counsel to ING in this proceeding. The opinions sought relate to the viability of ING's arguments on the merits of the claims against ICBC under the priority regulation and the loss transfer provisions, and also with respect to the timing and content of recommendations made by counsel to ING regarding the initiation of a section 31 *WSIA* application for Mr. Kregar and Ms. Begin.

Counsel could not agree on whether or not the opinions should be produced, and requested that I determine the matter based on written submissions filed. I was provided with, and have now reviewed, a copy of the transcript of Ms. Panetta's examination, as well as extensive written submissions and case law from both parties.

ICBC asserts that it has valid defences on both the priority and loss transfer issues. It also contends that in any event, it should not be responsible to repay ING for the amounts that it will not recover from WSIB, given the manner in which the files were adjusted. It specifically alleges that if ING had pursued a WSIAT application earlier in the process, the shortfall between the benefits paid under the *Schedule* and the amounts recovered from WSIB would be insignificant.

RELEVANT EVIDENCE:

Ms. Smith conducted the examination of Ms. Panetta in October 2011. She asked the witness what steps she had taken with regard to the 'WSIB issue' when she took over adjusting the file in December 2006. Ms. Panetta replied that she had discussed the issue with her unit manager upon assuming carriage of the file, but could not recall what her manager had instructed her to do. She advised that she had always noted in her disposition plan that the WSIB issue needed to be addressed, but could not explain how she planned to address it. She acknowledged that while she had assumed carriage of the files in December 2006, she had only instructed counsel to bring a section 31 WSIAT application in April 2008.

When asked whether she had obtained a legal opinion with regard to the initiation of a WSIAT application, the witness responded that she had. She was then asked whether she had relied on the opinion received to make a decision on the issue, and responded that she did not know. Counsel for ICBC requested that the opinion be produced, including the date that it was prepared. Counsel for ING advised the witness to refuse to do so.

Ms. Panetta was then asked to review any earlier legal opinions received, and advise whether they recommended that ING not bring a WSIAT application. Her counsel refused to allow her to do so. Ms. McKenna, counsel for ING at the examination, then stated that Jennifer Griffiths, a lawyer at the firm and earlier witness in the proceeding, had explained in her evidence why no WSIAT proceeding was commenced prior to 2008. Ms. McKenna also confirmed that the law firm had not provided an opinion in which they recommended that ING not bring a section 31 application to WSIAT.

Finally, I note that Ms. Panetta acknowledged that she had reviewed one of the legal opinions provided in order to prepare for her examination.

ARGUMENTS & ANALYSIS:

Counsel for ICBC contends that the opinions sought should be ordered to be produced. She submits that as one of the issues in the arbitration is whether ING adjusted the files reasonably, its state of mind has been put in issue. In those circumstances, she contends that as ING relied on the legal opinions received to make decisions about the steps to be taken, the solicitor-client privilege that would normally attach and protect this document from disclosure has been waived. Counsel cited various cases in support of this proposition, including *Bank Leu AG v. Gaming Lottery Corp. [1999] O.J. No. 3949, Leadbetter v. Her Majesty the Queen in right of Ontario et al. [2004] O.J. no. 1228.*

I do not agree with this contention. While ICBC argues that ING did not adjust the files appropriately, and contends that its failure to bring a section 31 WSIAT application early on in the process should result in less than full recovery if ICBC is found to be in priority (and/or subject to loss transfer), that is quite distinct from ING choosing to put its "state of mind" in issue. Counsel for ING submits that ING has never put its state of mind in issue, but rather has taken the position from the outset that the WSIB issue is a "red herring" that ICBC has focused on to deflect from the real issues surrounding the priority and loss transfer disputes.

In the cases cited above, the parties asserting that solicitor-client privilege applied to shield the targeted documents from disclosure had put the extent of their legal knowledge in issue. As in my decision in *Jevco v. Royal & SunAlliance* (unreported decision, dated May 6, 2011), courts and arbitrators have found that if a party is attempting to defend a decision made, and asserts that they acted as a result of legal advice received, the solicitor-client privilege attaching to the document is impliedly waived, because they have put their state of mind in issue, and that state of mind was dependent upon legal advice received.

It is an entirely different matter if an opposing party, as is the case here, asserts that the steps taken by the other party must have resulted from the legal advice received. I note parenthetically that Ms. Panetta could not answer whether or not she had relied upon the

legal advice she undoubtedly received in addressing the WSIB issue. Rather than ING stating that it took the steps it did solely because of the legal advice it received, and attempting to justify its action (or inaction) that way, the transcript of the examination indicates that it was counsel for ICBC attempting to determine whether, or to what extent, ING's adjusting of the files was informed by the legal advice it received.

Justice Perell addressed this issue recently in *Creative Career Systems Inc. v. Ontario* [2012] O.J. No. 262. He stated –

> *If a party places its state of mind in issue with respect to its claim or defence and has received legal advice to help form the state of mind, privilege will be deemed to be waived with respect to such legal advice.*
>
> *There is, however, a subtle and profound point here about when a party must answer questions about the occurrence of legal advice in the factual narrative of a case. The subtle and profound point is that 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.*
>
> *To justify a party being required to answer questions about the content of privileged communications, the party must utilize the presence or absence of legal advice as a material element of his or her claim or defence. The waiver of the privilege occurs when the party uses the receipt of legal advice as a material fact in his or her claim or defence. While the waiver is a deemed waiver, it requires the intentional act that the party makes legal advice an aspect of his or her case.*
>
> *Thus, a deemed waiver and an obligation to disclose a privileged communication requires two elements; namely: (1) the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence; which is to say that the presence or absence of legal advice is material to the lawsuit; and (2) the party who received the legal advice must make the receipt of it an issue in the claim or defence.* *(emphasis in the original)*

I agree with this reasoning. I can only add as a practical matter that if /when ICBC chooses to argue that the fact that ING waited until 2008 to take action on the WSIB issue should impact on the level of its recovery of benefits paid out, it will be the actions

or inaction of ING that will determine the issue, and not the question of whether or not they relied on the legal advice they received.

ICBC also argued that as Ms. Panetta referred to one of the legal opinions obtained in order to refresh her memory at the examination under oath, she had waived privilege over the document. Counsel relied on the decisions in *Copeland v. Fry* [2002] O.J. No. 1356 and *Hannis v. Tompkins* [2001] O.J. No. 5583 in support of this contention. I do not find these authorities to be persuasive on this point, and note that the documents in question in the *Copeland* case were not solicitor-client communications. I am in agreement with Justice Leitch's comments in *Wronick v. Allstate Insurance Co. of Canada* [1997] O.J. No. 544, to the effect that reference by a witness to privileged documentation in order to refresh her memory in preparation for an examination does not amount to a waiver of the privilege.

Finally, Ms. Smith noted that Ms. Panetta revealed during the course of her testimony that counsel for ING had recommended that a section 31 WSIAT application be pursued in April 2008, but that she refused to provide any further information related to this legal advice when asked to do so. Counsel contended that ING is obliged to produce the complete legal opinion received, as it is not fair to allow a party to "cherry pick" the facts that it discloses from a privileged document.

While I agree that it would be unfair for a party to reveal part of a legal opinion received without producing the substance of the complete opinion, a review of the transcript of Ms. Panetta's examination reveals that that is not what happened. After some questioning by Ms. Smith, counsel for ICBC, about whether the witness would have relied on the legal opinion received in order to decide how to approach the WSIB issue, counsel for ING interjected and asked Ms. Panetta whether she recalled why she made the decision in April 2008 to bring a WSIB application. The witness answered "Yes, because it was recommended". When she was then asked by Ms. Smith whether she had received any earlier opinions that recommended not bringing a WSIB application, she stated that she did not recall. Ms. Smith then asked her to review the opinions received, and Ms.

McKenna advised her to refuse to do so. Discussion between counsel ensued, and Ms. McKenna referred to earlier evidence provided on the point by Ms. Griffiths, and then confirmed that her firm had not provided an opinion that "recommended not bringing a section 31".

I find that that answer is a full response to the inquiry on the issue, and that no further disclosure is required.

CONCLUSION:

For the reasons outlined above, I deny ICBC's request for disclosure of the legal opinions provided to ING by their counsel.

COSTS:

Given the result, I am prepared to make a costs award against ICBC. I hereby order ICBC to pay costs of $1,200 (plus HST) to ING, payable within 60 days.

DATED at TORONTO, ONTARIO this _____ DAY OF JUNE, 2012.

_____

Shari L. Novick
Arbitrator