IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, SECTION 275 and REGULATION 664 OF THE ACT

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PORTAGE LA PRAIRIE MUTUAL INSURANCE COMPANY

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

PRELIMINARY AWARD – PRODUCTION ISSUE

COUNSEL:

Tim Crljenica for the Applicant

Peter A.B. Durant for the Respondent

BACKGROUND:

1. Marilyn Larocque was involved in an accident on January 14, 2013, when the vehicle that she was travelling in was rear-ended by a Ryder truck. Her vehicle was insured by Portage La Prairie Mutual Insurance Company ("Portage"), and the truck was insured by Royal and Sun Alliance Insurance Company of Canada ("RSA"). Ms. Larocque applied to Portage for payment of accident benefits under the *Schedule,* and her claim has been resolved on a full and final basis.

2. The parties agree both that the truck involved in the accident meets the definition of a "heavy commercial vehicle" under *Regulation 664*, and that the driver of the truck is fully liable for the accident. Portage accordingly seeks indemnification from RSA for $37,500 of the $40,000 that it paid out to the Claimant in settlement of her claim. Of this amount, approximately $31,000 was paid to cover past and future medical and rehabilitation benefits.

3. RSA questions whether the lump sum payment made by Portage to resolve the claim was reasonable. Portage adjusted Ms. Larocque's claim within the Minor Injury Guidelines ("MIG") provided in the *SABS*, and this designation was not challenged by the Claimant when she filed for Arbitration at FSCO. Given the limits imposed on payments for claims placed within the MIG, RSA contends that all evidence in Portage's possession should be provided so that it can assess whether the larger than expected payment was justified. Counsel has accordingly requested the production of Portage's complete file.

4. Portage produced all medical records and reports, SABS forms, and copies of its correspondence with the insured and third parties at the outset of the process. Initially, it resisted RSA's request for production of the log notes made by the Portage adjuster who was involved in the decision to settle the claim. I understand that these notes have now been produced to RSA.

5. Portage retained counsel to assist with the Application for Arbitration filed by Ms. Larocque. Its counsel was involved in the settlement discussions and ultimate resolution of the claim, which occurred a few weeks before a scheduled FSCO pre-hearing. Counsel for RSA has asked for copies of all correspondence between the Portage adjuster and her counsel at the firm of Thomas Gold Pettingill. Portage resists this request on the grounds of solicitor-client privilege. Counsel for RSA contends that the documents sought are relevant and should be produced.

PARTIES' POSITIONS:

6. Counsel filed detailed written submissions, as well as several cases, in support of their positions. The submissions focused on both the production of the adjusters' log notes and the correspondence between the adjuster and her solicitor. As the log notes were later provided by Portage after the submissions were filed, I do not need to determine this issue.

7. If I had been asked to do so, I would have found that, as a general rule, adjusters' notes should be produced if requested in a case of this type. I agree with Arbitrator Samis' finding in *Royal & Sun Alliance v. Wawanesa Mutual Insurance* (April 17, 2012) that documents or notes in the Applicant insurer's file that "can reasonably be expected to illuminate claims handling decisions and disclose the criteria applied or disregarded" in the adjusting of a file are producible. While a second party insurer is not entitled to question every claims handling decision made by the adjuster who managed the claim, a degree of transparency is necessary for the Respondent insurer to properly address requests for reimbursements under the Loss Transfer provisions.

8. I turn now to the parties' submissions on the question of whether the correspondence generated between the adjuster and her counsel in the course of negotiating a settlement of the claim is producible, or whether it is protected from production by solicitor-client privilege.

RSA's position

9. Counsel noted that despite having determined that Ms. Larocque's claim fell within the MIG, which provides for a maximum payment of $3,500 for medical and rehabilitation benefits, Portage allocated $31,000 of the lump sum settlement amount to this category of benefits. He contended that this squarely raises the question of whether the payments made were reasonable, and that any documents that relate to the decision to pay this amount should be produced.

10. While counsel acknowledged that privilege generally attaches to communications between a solicitor and her client, Mr. Durant contended that privilege has been waived in these circumstances. He asserts that the legal advice received by the Portage adjuster influenced her decision to pay what she did to settle Ms. Larocque's claim, and that Portage has therefore put its "state of mind" in issue. Counsel cited various cases in which courts and arbitrators have determined that in these circumstances, privilege over any communications or documents generated between the parties is deemed to be waived. (*Jevco Insurance v. RSA* (Novick) May 2011, *Creative Career Systems Inc. v. Ontario,* 2012 ONSC 649, *Leggat v. Jennings,* 2015 ONSC 237)

Portage's position

11. Counsel for Portage noted that all medical records, accident benefits forms and correspondence with the insured and third parties to RSA have been produced. As noted above, he also produced copies of the relevant adjusters' log notes after the initial submissions from counsel were exchanged. He asserts, however, that the correspondence between Portage and its lawyer is protected by solicitor –client privilege, and need not be produced.

12. Mr. Crljenica noted that the Supreme Court of Canada determined in *Goodis v. Ontario Correctional Services* [2006] 2 S.C.R. 32 that the appropriate test for assessing whether a document covered by solicitor –client privilege should be disclosed is one of "absolute necessity", and that that is as restrictive a test as may be formulated, short of an absolute prohibition.

13. He also noted Justice Perell's finding in *Creative Career Systems, supra,* and Justice Gray's comments in *Leggat v. Jennings, supra,* that it is only where a party directly raises their reliance on legal advice as an explanation for his or her conduct or state of mind, that privilege over those communications is impliedly waived. He advised that Portage decided to pay the amounts that it did based on the evidence it received from Ms. Larocque and her counsel in support of her claim, and that it is not relying on the legal advice provided by its solicitors to justify the payment of those amounts.

ANALYSIS & FINDINGS:

14. The Loss Transfer jurisprudence makes clear that a second party insurer asked to reimburse a first party insurer for benefits paid to a Claimant has a limited right to question the appropriateness of the benefits paid out. As Arbitrator Samworth stated in *Commercial Union Assurance v. Boreal Property & Casualty Co. (*December 21, 1998), the indemnifying insurer is entitled to look at the "reasonableness of the payments" but the inquiry is limited to confirming that the first insurer 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.*

15. I agree with this analysis. In this case, RSA does not allege that Portage acted in bad faith. It suggests, however, that items (2) or (3) may apply, in that Portage made payments exceeding the MIG limits and are therefore not covered by the *SABS,* and/or that Portage handled the claim negligently by grossly overpaying Ms. Larocque when it paid $31,000 to her for past and future medical and rehabilitation benefits. While I am not opining on the merits of this argument at this stage, I agree that a payment of this amount on a claim that was adjusted within the MIG merits further scrutiny.

16. The adjusters' log notes have been provided, which presumably shed some light on the thinking behind the decision to settle the claim at that level. I have not seen the notes, so am not aware if that is the case. In any event, Portage retained counsel to assist with the Arbitration process, and Mr. Crljenica has advised that his firm was involved in finalising the settlement that was reached a few weeks before a scheduled FSCO Pre-hearing.

17. As a general rule, communications between a solicitor and client are protected from disclosure by solicitor-client privilege. As I stated in *Jevco v. Royal & SunAlliance, supra,* courts have repeatedly upheld the right of a party to communicate with his or her legal advisor in confidence, with the expectation that these communications will not be disclosed. However, this rule is not absolute, and privilege can be waived either explicitly by the party that enjoys the privilege, or implicitly, absent the intention to do so. The onus to prove that privilege has been waived rests with the party seeking to establish that the communication in question should be produced (*Guelph(City) v. Super Blue Box Recycling Corp,* [2004] O.J. No. 4468 (S.C.J.).

18. The authorities filed by counsel hold that the mere fact that a party has disclosed that legal advice was obtained does not result in privilege over these communications being waived. However, if a party puts its "state of mind" in issue, meaning that it claims that the actions it took were based on advice received from their solicitor, it will be deemed to have waived privilege over any such communications. As Justice Perell stated in *Creative Career Systems, supra,* in order to require a party to reveal the content of privileged communications, it 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…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.*
>
> *(at para. 29)*

19. When the above principles are applied to the circumstances in this case, I find that Portage did not waive privilege over its communications with its counsel. While Mr.

Crljenica advised that counsel at his firm was involved in the negotiation of the settlement, it was clear from his submissions that Portage was not asserting that it paid the amounts that it did to Ms. Larocque because it was advised to do so by its counsel. Instead, he asserts that the payments were made as a result of the evidence they received from the Claimant and her counsel.

20. This is a different scenario than the situation that presented itself in my earlier decision in *Jevco v. RSA, supra.* In that case, the Claimant reached a full and final resolution of her accident benefits claim with Jevco approximately two years after the accident in which she was injured. Three years after that, her counsel advised Jevco that his client was rescinding the settlement. Jevco agreed that the settlement documentation executed at the time did not properly give rise to a full and final settlement, and agreed to reopen the claim.

21. Jevco subsequently pursued RSA for indemnification of the benefits paid out in accordance with the Loss Transfer provisions. RSA took the position that Jevco had acted improperly in agreeing to reopen the claim, and sought production of all relevant documentation in Jevco's possession regarding the settlement. Jevco resisted production of a legal opinion that it had sought on the enforceability of the settlement. Counsel for Jevco acknowledged that his client had agreed to resile from its initial position that the settlement that had been reached with the Claimant was binding based on the legal opinion received.

22. I determined that Jevco had clearly relied on the legal opinion it received in its defence to RSA's allegation that it had acted improperly, and that it had therefore put its "state of mind" in issue. I found that Jevco had therefore impliedly waived it privilege over this communication, and was directed to produce the opinion to RSA.

23. As noted above, Portage does not assert in this case that it reached the settlement that it did with Ms. Larocque on the basis of the legal advice it received. Solicitor-client privilege is accordingly maintained over these communications, and I therefore decline to order that they be produced.

24. If the parties cannot resolve this dispute, we will proceed to address the question of whether the payments made to Ms. Larocque were reasonable. While it would be in Portage's best interest to provide all evidence that they rely on in support of the settlement reached, given the amounts paid out, they are not required to produce the above communications.

CONCLUSION:

25. For the reasons set out above, Portage is not required to produce copies of any communication between the adjuster involved in settling the claim and the firm of Thomas Gold Pettingill.

26. Costs related to this preliminary issue are payable by RSA to Portage, but will be addressed at the conclusion of the dispute.

27. I will have my assistant contact both of your offices shortly, so that a further pre-hearing conference can be convened at a time at which we are all available.

DATED at TORONTO, ONTARIO this _____ DAY OF JANUARY, 2017.

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Shari L. Novick
Arbitrator