IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, SECTION 268 and REGULATION 283/95 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:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

RBC INSURANCE COMPANY OF CANADA, WAWANESA MUTUAL INSURANCE COMPANY and THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondents

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Nicholaus de Koning for the Applicant

John Reiterowksi for the Respondent RBC

Kevin Mitchell and Julianne Brimfield for the Respondent Wawanesa

Laura Wright for the Respondent Motor Vehicle Accident Claims Fund

PRELIMINARY ISSUE:

1. Is Dominion precluded from proceeding with this Arbitration because of any of the reasons below:
    a. it entered into a binding agreement to abandon the dispute,
    b. it has waived its right to do so, or,
    c. by operation of the legal principle of estoppel?

RESULT:

1. Dominion entered into a binding agreement to abandon the dispute, and is therefore precluded from proceeding further with the Arbitration.

BACKGROUND:

1. Sartaj Kalkat was involved in a motor vehicle accident on April 14, 2014, while driving a rental car that was owned by Metro Car and Truck Rentals. A vehicle insured by Wawanesa was rear-ended by a vehicle insured by RBC, which in turn rear-ended Mr. Kalkat's vehicle. He believed that the vehicle he was driving was insured by Travelers / Dominion ("Dominion"), and submitted an Application for payment of accident benefits to that company in mid-June 2014.

2. Dominion conducted an investigation and concluded that the vehicle involved in the accident was not in fact insured by the policy it issued to Metro Car and Truck Rentals. It provided written notice to the Motor Vehicle Accident Claims Fund ('the Fund") of its objection to pay benefits to Mr. Kalkat in September 2014. RBC and Wawanesa were subsequently put on notice in January 2015, and all three Respondents were provided with a Notice of Commencement of Arbitration on September 3, 2015.

3. The Respondents contend that Dominion cannot proceed with this Arbitration because they agreed to abandon the Priority Dispute in November 2015 and a settlement of the matter was reached. All parties agreed that this question would be decided by way

of a preliminary issue hearing, and a hearing was convened for this purpose on April 25, 2017.

EVIDENCE RELATING TO ALLEGED SETTLEMENT:

4. The underlying facts are not in dispute and are contained in a series of letters and email correspondence between counsel. Given that this communication is at the heart of the parties' dispute, I will set out the chronology and content of the relevant documents sent and received.

September 3, 2015 - Notice of Commencement of Arbitration sent by counsel for Dominion to all Respondents

September 14, October 15, 2015 – Kevin Mitchell advises by email that he has been retained by Wawanesa, requests further info and whether RBC and Fund have appointed counsel yet

October 16, 2015 – Counsel for Dominion responds to Mr. Mitchell by email as follows:

> *…please note that I have been instructed to hold off for a couple of weeks to see if counsel can locate their client (he appears to have disappeared for some time and may have abandoned his claim). In that situation, my client may be agreeable to dropping the priority dispute altogether to avoid the expense. Stay tuned for more info soon.*

November 13, 2015 – Counsel for Dominion sends a letter to Mr. Mitchell and counsel retained by RBC and the Fund, which states:

> *Due to inactivity on this file, and in the interest of minimizing the legal expenses, please be advised that my client has instructed me to abandon this priority dispute at this time. I trust that given the early stage that we have agreed to abandon the claim, and the fact that we have not yet even appointed an arbitrator, you will all agree to a without costs dismissal.*

Later that day, Mr. Mitchell writes an email to counsel for Dominion acknowledging the above and advising that his client is amenable to Dominion abandoning the dispute on a without costs basis "with the caveat that *your client executes a release in favour of mine that the matter is now and forever concluded"*.

Counsel for Dominion responds – "please send over a draft of the release and *I am confident that my client will agree to execute same".*

November 16, 2015 – Counsel for RBC responds to counsel for Dominion by letter stating that he has instructions "not to seek costs upon your confirmation that Dominion will not seek priority against my client"

January 14, 2016 – Counsel for Dominion writes a letter to counsel for RBC advising that further to his earlier correspondence, "*Dominion has abandoned any priority dispute regarding this claim as against RBC. You can proceed to close your file at this point".*

February 5, 2016 – Counsel for Wawanesa writes to counsel for Dominion referencing his earlier correspondence that Dominion intends to abandon the priority dispute against Wawanesa, and encloses a release

February 10, 2016 – Counsel for the Fund writes to counsel for Dominion advising that she has instructions to agree to a without costs dismissal provided no party seeks any costs from the Fund.

February 17, 2016 - The Claimant applies for Mediation at the FSCO

March 10, 2016 – New counsel for Dominion emails all counsel as follows:

> ***Dear Counsel,***
>
> ***As you may recall, Mr. Gabriel Flatt, who was at my firm at the time, was handling this matter on behalf of Dominion. Mr. Flatt has now left my firm and is working at Mr. Mitchell's firm. (Mr. Mitchell, I would appreciate it if you would confirm that your firm has implemented a firewall in this regard). I have been asked to take over on this matter.***
>
> ***Mr. Flatt sent written correspondence to you in November 2015, prior to his departure from my firm, stating that Dominion wished to abandon this priority dispute.***
>
> ***The Dominion representative advises me however that her company's intention was to discontinue the priority dispute only on a basis that was without prejudice to her company's right to continue it if the first party AB claim became active again, which it has. Dominion is now responding to a FSCO Application for Mediation. Having reviewed Mr. Flatt's correspondence, it would have been desirable if it was more clear as to Dominion's intentions, however, it appears Dominion did not wish to abandon this matter on an unqualified basis.***
>
> ***Dominion wishes to proceed with this priority dispute and have a pre hearing at the soonest reasonable opportunity.***

I will be contacting Ms. Novick in this regard to arrange for the pre-hearing.

Thank you for your attention to this matter.

5. Mr. Kalkat's counsel subsequently issued a Statement of Claim on March 31, 2016 seeking tort damages against various Defendants and against Dominion, seeking various declarations of entitlement to accident benefits under the *Schedule*. He also filed an Application to the License Appeal Tribunal on July 15, 2016.

PARTIES' ARGUMENTS:

Respondents' submissions

6. All of the Respondents made detailed and thorough arguments, focused on three themes – that there was a binding agreement in November 2015 that the dispute was resolved on a final basis, that Dominion has waived its right to continue with this Arbitration, and/or that Dominion is estopped from proceeding with this dispute. Each contended that it would be unjust to allow Dominion to resile from its stated position that it intended to abandon this dispute, and that Dominion should be precluded from proceeding with this Arbitration.

7. Counsel for Wawanesa highlighted the Court of Appeal's decision in *Kingsway General Insurance v. West Wawanosh Insurance Co.* [2002] 58 O.R. (3d) 251, and its comments that the priority scheme in *Regulation 283/95* provides precise terms for resolving disputes between insurers, and that insurers involved in priority disputes are sophisticated litigants with access to expert advice. In this context, the Court stated that "clarity and certainty" are of primary concern, and that there is "little room for ..carving out ...exceptions designed to deal with the equities of particular cases."

8. Counsel noted that Dominion participates in many such disputes, and that its counsel undoubtedly communicates its positions in writing on a regular basis. Given that fact, the phrase "my client has instructed me to abandon this priority dispute at this time" in the November 13, 2015 letter from Dominion's counsel, along with the suggestion

that as the abandonment was at an early stage "you will agree to a without costs dismissal", should be taken as a clear expression of its intent to end the dispute.

9. Counsel suggested that the agreement to abandon a dispute in this context is akin to a legal contract, and that the principles of offer and acceptance accordingly apply. The communication between the parties indicates that an offer was made by Dominion, which was accepted by Wawanesa, with the caveat that a Release be signed. The caveat was clearly accepted by Dominion, resulting in a binding agreement.

10. Counsel for RBC pointed to the letter sent by counsel for Dominion to his predecessor on the file on January 14, 2016 stating "Dominion has abandoned any priority dispute regarding this claim as against RBC. You can proceed to close your file at this point." He stated that this language is clear and leaves no doubt that all terms have been finalised and that the dispute was finally settled at that time. Counsel for the Fund similarly noted that she accepted the one term – a without costs dismissal – put forward by counsel for Dominion in her responding letter of February 10, 2016, and submitted that at that point the agreement was concluded.

11. Counsel also noted that Arbitrators have generally not upheld insurers' attempts to resile from agreements to accept priority once they have communicated their acceptance, except where there are extreme or unusual circumstances. The following cases were cited in support of this position – *Motors Insurance Co. v. Co-operators Insurance Co.* (Arbitrator Jones – August 2004), *Enterprise Rent A Car v. ING Insurance Co. of Canada (*Arbitrator Jones – November 2006*) and Aviva Insurance Co. of Canada v. State Farm Insurance Co. (*Arbitrator Novick – March 2012*).*

12. Counsel noted my comments in the latter case that unless false information is provided in an effort to mislead another insurer, or important information is intentionally withheld, insurers should not be permitted to back away from a clearly expressed intent to assume priority for a claim. The same reasoning should apply to a situation involving

an insurer who decides to abandon a priority dispute and then attempts to revive it, as in this case.

13. Counsel noted that the only reason provided by Dominion for its change in approach is that after being dormant for awhile, Mr. Kalkat's accident benefits claim became active. While Dominion may have assumed that the Claimant would not be seeking further benefits, counsel submitted that this is a risk that insurers weigh on a regular basis, and does not fall into the category of "extreme or unusual circumstances". Counsel for RBC noted that Dominion denied a Treatment Plan submitted by the Claimant on May 5, 2014, and contended that it would have known that Mr. Kalkat had two years to challenge that denial. He contended that if Dominion chose to abandon the priority dispute six months prior to the two-year anniversary of that denial, it must bear the consequences of that decision.

14. Counsel also cited the case of *Erie Insurance Company v. Progressive Casualty Insurance* (November 27, 2009), in which I found that an exchange of correspondence between counsel similar to that in this case, where Erie advised that it would abandon a priority dispute against Progressive, and counsel for Progressive sent a Release which was never signed, constituted a settlement of the priority dispute between the parties. Counsel noted that this result was reached despite the fact that the adjuster from Erie had sworn an affidavit in which she advised that she had not instructed her counsel to agree to a permanent acceptance of priority. Wawanesa contended that the same result should flow in this case.

15. Counsel also contended that Dominion has waived its right to pursue this dispute. Citing the Supreme Court of Canada's decision in *Maritime Life Assurance v. Saskatchewan River Bungalows [1994] 2 SCR 490*, counsel stated that waiver will be found when the evidence demonstrates that the party who has waived its rights had both full knowledge of the rights in question, and has displayed an unequivocal and conscious intention to abandon them. Given the frequency with which Dominion is involved in disputes of this type, counsel argued that it clearly operated with full knowledge of its

rights. Counsel also contended that the sequence and content of the correspondence exchanged, and the reference in Dominion's correspondence to minimising legal expenses, shows a clear intention to abandon its right to pursue other insurers for priority.

16. Counsel noted that this test has been applied in the private arbitration context in *Motors Insurance Co. v. Old Republic Insurance* (Arbitrator Jones – November 2008), and was upheld on appeal (2009) CanLii 37707. She highlighted that the court stated that there was no doubt that an insurer in this context has full knowledge of their rights.

17. Finally, counsel cited the Supreme Court of Canada's decisions in *Ryan v. Moore* [2005] 2 S.C.R. 53 and *Maracle v. Travelers Indemnity Co. of Canada* [1991] 2 S.C.R. 50 in support of its submission that Dominion should be estopped from proceeding with this dispute. The court held in those cases that estoppel can be found when a party represents by its statement or conduct that it has changed its legal position, and that the other party has acted in reliance on that representation, or "in some way changed its position" (at p.57). Counsel submitted that the communication between the parties in this case clearly indicates a shared assumption that Dominion intended to abandon the dispute, which was relied on by the Respondents. Counsel noted that estoppel has been applied to priority disputes in the decisions in *Motors v. Old Republic, supra,* and *Kingsway General Insurance Co. v. The Personal Insurance Co.* (Arbitrator Jones – June 2006).

Dominion's submissions

18. Counsel for Dominion disputed the Respondents' contention that the communication exchanged between the parties indicates that a final settlement of the priority dispute was reached. He submitted that an analysis of the letters exchanged in late 2015 reveal that his client was considering the idea of not pursuing the dispute due to cost/benefit considerations, as it appeared that Mr. Kalkat was no longer submitting claims for payments under the *Schedule.* He contended, however, that Dominion did not advise at any time that it intended to abandon the dispute entirely, and argued that the

Respondents did not signal with their conduct or communication that they assumed that to be the case.

19. Mr. de Koning argued that when the letter of November 13, 2015 from his predecessor on the file is read carefully, it is evident that counsel is suggesting that the dispute be "shelved" as a result of a lack of activity in the AB claim. He notes that it starts with the statement "Due to inactivity on this file, and in the interests of minimizing the legal expenses". He argues that this suggests that the decision to abandon the dispute was not unequivocal, but was rather based on the assumption and condition that no further accident benefits claims would be presented by Mr. Kalkat.

20. Counsel submitted that in any event, the responses received by counsel for the Respondents contained conditions that were never met, and that a settlement was not accordingly concluded. He noted that shortly after receiving the November 13th letter from previous counsel for Dominion, Mr. Mitchell quickly advised that Wawanesa would accept the offer if Dominion executed a Release that the matter was "now and forever concluded". The Release was not forwarded until early February 2016, and was never signed. He contended that Wawanesa had made the signed Release a pre-condition to settlement of the dispute, and the fact that it was never signed indicates that a final settlement was never reached.

21. The Fund's response to the November 13th letter was different. Mr. De Koning noted that counsel for the Fund wrote in February 2016 to say that her client would agree to a without costs dismissal of the arbitration on the condition that "no party seeks any costs or other disbursement from the…Fund". He contended that this also imposed a condition on the settlement that was never met, as none of the other parties confirmed in any subsequent communication that they would agree to this term.

22. Counsel for Dominion conceded that RBC was is in a somewhat better position than the other Respondents, given the exchange of correspondence that passed between counsel. He contended, however, that Mr. Whibbs' letter of November 16, 2015

responding to the initial letter advising that he has received instructions not to seek costs "upon your confirmation that Dominion will not seek priority against my client" also sets out a further condition to be met.

23. In response to the argument that his client has waived its right to proceed with this dispute, counsel contended that the letter in question was not so clear and unequivocal as to constitute a "waiver", for the reasons set out above. He submitted that even if it was found to be evidence of Dominion's clear intention to abandon its rights, waiver can be revoked or retracted if reasonable notice is provided to the other parties, as was done in the *Maritime Life v. Saskatchewan River Bungalows, supra,* case. Counsel also relied on the Court of Appeal's decision in *Weeks et al. v. Rosocha* (Ont. C.A. (1983) 41 O.R. (2d) 787 and *Guillaume et al. v. Stirton* CanLii (1978) 1844 (Sask. C.A.) in support of his argument in this regard.

24. Finally, counsel for Dominion responded to the Respondents' arguments that his client should be estopped from proceeding with the dispute by noting that a party asserting an estoppel must show that they have relied on the assertion made to their detriment. He contended that there is no evidence in this case suggesting that the Respondents suffered any prejudice as a result of Dominion having shifted its position, and submitted that the requirements for estoppel have therefore not been made out.

Reply submissions

25. Counsel responded that the idea of retracting or revoking a waiver that has been communicated is contrary to the intention of the priority regulation, which has been described as an efficient scheme for resolving priority disputes. Counsel for Wawanesa also noted that all of the Respondents had accepted Dominion's offer to abandon the dispute by the time that Dominion attempted to withdraw the offer, four months later. She submitted that in light of the strict time limits imposed in the regulation regarding other steps to be taken in pursuing a dispute, if retraction of a waiver is permitted, it should be done within a short time.

26. Counsel also claimed that the Respondents have suffered prejudice and relied on Dominion's assertion that it would abandon the claim to their detriment, in that they have lost the opportunity to investigate the priority issues in a timely manner. He noted that while the accident occurred in April 2014, Dominion counsel only stated that his client intended to continue to pursue the priority dispute in March 2016, almost two years later, and that it is unclear at this point whether the Claimant can be located.

27. Finally, counsel for Wawanesa asserted that the fact that the Release forwarded to Dominion was never signed does not mean that the settlement was never finalised, citing the courts' decisions in *Sahota v. Sahota et al.* (2016) ONSC CanLii 314 and *Olivieri v. Sherman et al.* (2007) ONCA CanLii 491. He also noted that when he wrote to counsel for Dominion and advised that his client required a Release to be signed, counsel invited him to send it over and stated that he was "confident that my client will agree to execute same". He argued that this indicates a clear meeting of the minds on the issue, and that the Release was a mere formality that did not form part of the settlement itself.

ANALYSIS & REASONS:

28. After considering all of the above submissions, and reviewing the cases cited, I find that a final and binding settlement was entered into by the parties pursuant to which Dominion agreed to abandon the Priority Dispute in exchange for the Respondents not seeking their legal costs related to the dispute. Dominion is therefore precluded from proceeding further with this matter.

29. The cases cited by counsel provide that a settlement reached between parties involved in a dispute is a form of contract, and that in analysing whether a settlement has occurred, the rules relating to offer and acceptance apply. The Court of Appeal in *Olivieri v. Sherman et al.* [2007] 86 O.R. (3d) 7789 (at para.41) stated as follows –

> *A settlement agreement is a contract. Thus it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all of the essential terms of the settlement: (Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991) 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-4)*

The Court went on to state (at para. 44) –

> *A determination as to whether a concluded agreement exists does not depend on an inquiry into the actual state of mind of one of the parties or…of one party's subjective intention.…Where, as here, the agreement is in writing, it is to be measured by an objective reading of the language chosen by the parties to reflect their agreement.*

30. I find that an objective reading of the written exchanges between counsel in this case indicate that the parties had both a mutual intention to reach a settlement, and that they reached agreement on all of the essential terms of that settlement. The parties' submissions focused on the letter sent by Dominion's counsel on November 13, 2015, in which he advised that his client has instructed him to abandon the dispute. While this is a key document in the exchange, I will go back one step so that this letter can be considered in the context of earlier communications between the parties.

31. As set out above, Mr. Mitchell sent an email to previous Dominion counsel about one month after his client received the Notice of Commencement of Arbitration from Dominion, seeking some further information. Dominion counsel responded on October 16, 2015 –

> *I will get you all of the requested information shortly. However, please note that I have been instructed to hold off for a couple of weeks to see if counsel can locate their client (he appears to have disappeared for some time and may have abandoned his claim.* ***In that situation, my client may be agreeable to dropping the priority dispute altogether to avoid the expense.*** *Stay tuned for more info soon.*
>
> (emphasis added)

32. Exactly four weeks later, counsel for Dominion wrote back to Mr. Mitchell, as well as to counsel for RBC and the Fund, and states –

> *Due to inactivity on this file, and in the interest of minimizing the legal expenses, please be advised* ***that my client has instructed me to abandon this priority dispute at this time.***
>
> (emphasis added)

33. In my view, this statement (in bold face), standing alone, is strong evidence of a clear offer to end the dispute. However, when it is considered against the backdrop of the

earlier statement that Dominion may be agreeable to dropping the dispute "altogether" as the Claimant could not be located, it is overwhelming evidence of Dominion's intention to permanently abandon the dispute against the Respondents.

34. Two further exchanges must then be noted. Mr. Whibbs, then counsel for RBC, wrote to counsel for Dominion a few days later, stating that he has "instructions not to seek any costs upon your confirmation that Dominion will not seek priority against my client". In response to that letter, counsel for Dominion writes that Mr. Whibbs can close his file as "Dominion has abandoned any priority dispute regarding this claim as against RBC." It is difficult to see how this exchange constitutes anything other than a clear intention to settle the matter on a final basis, and an agreement on its essential terms. No further conditions were attached or imposed to the agreement, and there was no reference to the dispute being revived if the Claimant decided to pursue further AB claims.

35. Given this clear exchange with counsel for RBC, I find it reasonable to assume that Dominion's intentions were the same with regard to Wawanesa or the Fund. For the sake of completeness, I will nevertheless consider the further exchanges with counsel for Wawanesa and the Fund.

36. Mr. Mitchell forwarded an email to counsel for Dominion shortly after receiving his November 13 letter, stating that his client was amenable to the settlement proposal "with the caveat that your client executes a release in favour of mine *that the matter is now and forever concluded*". Dominion counsel quickly replied and invited Mr. Mitchell to send him a draft release, and states "I am confident that my client will agree to execute same". Again, it is difficult to see this as anything other than a clear intention to resolve matters on a final basis, as well as an agreement on the essential terms of the settlement.

37. Dominion argued at the hearing that a signed release was a precondition to the settlement, and that as none was ever signed, the settlement was not concluded. I do not agree with this contention. In *Sahota v. Sahota et al., supra,* Justice Aitken (writing for the Divisional Court) commented as follows (at para.16) –

> *It is not necessary for formal settlement documents to be executed before a settlement may exist, as long as there is evidence of the necessary mutual intention to reach a final agreement, and the essential terms of that final agreement can be identified. (Bawitko Investments Ltd. v. Kernels Popcorn Ltd.(1991) 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-104; and Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc. 1995 Carswell Ont 4182 (Gen Div.) The court may consider conduct subsequent to the purported agreement to determine whether the parties had manifested the intention to enter a binding contract.*

38. The court in that case was analysing an email exchange between counsel in which a purported settlement was challenged. The court went on to state (at para. 32) –

> *In …[the] initial email of January 22, 2014, he stipulated that the release would have to be in LAWPRO's standard form. Therefore, there was no uncertainty or confusion as to the nature of the release sought. But even had Bernstein not stipulated the exact wording of the release, this would not have meant that no settlement had been arrived at until the release had been drafted.* ***Where a provision in a settlement agreement is that the parties will provide each other with full and final releases, further agreement on the specific wording of those releases is not required before there is a binding settlement agreement, unless there is some indication that the parties' settlement was conditional on such further agreement*** *(Olivieri, at paras. 45-48)*
>
> (emphasis added)

39. On the facts before me, there is no suggestion that the settlement was conditional on any terms not expressed or on any "further agreement". Dominion had suggested that the Respondents agree to a without costs dismissal, and each responding party had communicated its agreement to do so. In response to Mr. Mitchell's note that his client would require a release from Dominion that the matter is "now and forever concluded", counsel for Dominion asserted that he was "confident that my client will agree to execute same". I find that this exchange is sufficient to constitute a binding agreement, and that the absence of a signed release is immaterial.

40. Lastly, counsel for the Fund responded to the November 13, 2015 letter from counsel for Dominion on February 10, 2016 by stating that she had received instructions to agree to the "without costs dismissal' proposed, provided that no party seeks costs against the Fund. This letter was copied to counsel for RBC and Wawanesa. This constitutes a clear acceptance of the one condition requested by Dominion and in my view, finalises the Fund's acceptance of the settlement proposal. Given that it was Dominion rather than the Fund that brought Wawanesa and RBC into the Arbitration, there would be no basis for either of those Respondents to seek costs against the Fund, and the proviso that no party seeks costs against the Fund consequently does not create a new condition.

41. My finding that the above documents constitute a binding agreement to settle the dispute on a final basis essentially ends the matter. However, as the facts also give rise to a discussion of the application of the doctrines of waiver and estoppel in these circumstances, and the parties made extensive submissions on those points, I will set out some of my thoughts on these issues.

42. There have been many cases in which insurers who have either agreed to accept priority or to reimburse a first party insurer under the Loss Transfer provisions have attempted to withdraw their agreement. As well, but apparently less frequently, insurers who advise that they are prepared to abandon priority disputes – as is the case here – attempt to shift their position and proceed with the dispute. Responding insurers assert that the party that has accepted the exposure has waived its right to shift from that position or should be estopped from doing so. Despite the authority provided to arbitrators in section 31 of the *Arbitration Act* to apply equitable remedies in proceedings of this type, arbitrators have generally looked at these attempts very critically.

43. Arbitrator Samis stated in *TD Home & Auto Insurance Company v. Markel Insurance* (August 24, 2011) that –

> *I certainly agree with the proposition that insurers who formally take a position about a loss transfer or priority matter, should not be allowed to resile from that position simply because they discover some new fact or*

> *circumstance later in the process. It would be most unsatisfactory if insurers could accept responsibility lightly, and then change their position, perhaps repeatedly, with the evolution of their understanding of a case.*

44. Arbitrator Jones commented in *Motors Insurance v. Co-operators Insurance Company* (August 2004) that parties should only be permitted to withdraw from an agreement in the most extreme circumstances, and that "in a scheme where certainty, simplicity and efficiency are important, allowing one party to revoke a previous agreement simply because they later become aware of new facts is not desirable".

45. I agree wholeheartedly with these comments. The Court of Appeal has set out a framework within which all priority disputes should be considered, in its oft-cited decision in *Kingsway General Insurance v. West Wawanosh Insurance Co., supra.* It held that the Regulation sets out "in precise and specific terms a scheme for resolving disputes between insurers", and that parties are entitled to "assume and rely upon the requirement for compliance with those provisions". Given that insurers involved in priority disputes are sophisticated litigants who deal with these disputes on a daily basis, they need to "make appropriate decision with respect to conducting investigations", and there is "little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of a particular case".

46. Bearing these instructions in mind, I find that an insurer who does not take into account that the two-year deadline for a Claimant to challenge the denial of a benefit under the *Schedule* has not yet passed, and assumes that there will be no more activity on a file – as seems to have happened here – should not be allowed to resile from its agreement to abandon a priority dispute when the Claimant later emerges and makes further claims.

47. In my view, to permit that shift, whether or not 'detrimental reliance' can be demonstrated, would directly conflict with the Court of Appeal's directives in the above case and would ignore the instruction that "clarity and certainty of application are of

primary concern". While the priority scheme strives to be fair, when the interest of the efficient operation of a system addressing thousands of disputes is balanced against the right of a given insurer to change its mind when it either made a mistake or did not communicate clearly enough on one particular file, and may consequently be responsible for a higher payout on one of its claims, I find that the balance should clearly tip in favour of an efficient system.

48. For all of the reasons set out above, I find that Dominion is precluded from proceeding with this Arbitration.

ORDER:

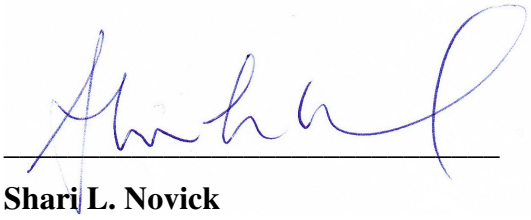
49. The Arbitration is hereby dismissed.

COSTS:

50. Unless I am advised of a formal offer of settlement having been made, I find that the Respondents are entitled to their legal costs relating to this proceeding. If the parties are unable to agree on the quantum of costs owing, I invite them to contact me and a process for determining the issue will be discussed.

51. Given the result, Dominion is also responsible to pay the Arbitration fees. I will accordingly forward my final account, directed to Mr. de Koning, with this decision.

DATED at TORONTO, ONTARIO this __20th _ DAY OF JULY, 2017.



Shari L. Novick
Arbitrator