IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT,* R.S.O. 1990, AND *ONTARIO REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

PRELIMINARY DECISION – MOTION FOR PRODUCTION OF TORT SURVEILLANCE

COUNSEL:

Jason R. Frost and Megan Cui for the Applicant

Brenda M. Lockwood and Katherine E. Kolnhofer for the Respondent

Zoran Samac for Marc Dulude

BACKGROUND:

1. Marc Dulude was struck by a taxi insured by Economical Mutual Insurance Company ("Economical") as he was standing on the street on August 19, 2012. He applied to Economical for payment of accident benefits under the *SABS*, and was determined to be catastrophically impaired under the *Schedule.* His claims have now been resolved on a full and final basis.

2. Mr. Dulude was not a named insured or listed driver on any policy at the time of the accident. His father, Jean-Claude Dulude, drove a Hyundai Sonata insured by Wawanesa Mutual Insurance Company ("Wawanesa") at that time. The named insured on that policy was a company called Direct Upholstery Ltd., the owner of which was Pasquale Raviele. Evidence gathered earlier in the proceeding reveals that Mr. Raviele and Jean-Claude Dulude were long-time business associates, and that both Jean-Claude and Marc Dulude, the Claimant, were working at another company owned by Mr. Raviele at the time of the accident.

3. Marc Dulude's driver's license was under suspension at the time of accident, and had been for over two years prior to that date. Economical contends that the parties participated in a scheme in the years prior to the accident, by which Jean-Claude made vehicles that he owned or leased available for his son Marc's "regular use". Economical submits that the Hyundai Sonata leased through Direct Upholstery and insured by Wawanesa at the time of the accident was one such vehicle, and that the Claimant would therefore be a deemed "insured" under the Wawanesa policy by virtue of section 3(7)f of the *Schedule.* If so, Wawanesa would be in higher priority to pay the claim.

4. Records obtained from the MTO earlier in the proceeding reveal that Marc was charged with speeding in October 2010, a couple of years before the accident, while driving his father's Hyundai. He gave evidence at his EUO that he may have been driving that car when he was stopped by the police in March 2011, while his licence was under suspension. Further, Economical obtained surveillance in the course of adjusting Mr. Dulude's accident benefits claim that showed him driving the Hyundai in August 2013, approximately one year after the accident, on a couple of occasions.

5. Wawanesa conceded earlier in the proceeding that the Claimant's father had made another vehicle available for his regular use, despite his licence being under suspension. That vehicle was sold in October 2011.

MOTION – PRODUCTION OF TORT SURVEILLANCE:

6. Mr. Dulude brought a tort claim seeking damages from the driver of the taxi that struck him. Chris Blom, a lawyer at Miller Thomson in Toronto, was retained by Economical to defend the driver in that action, which is still ongoing. Mr. Frost, counsel for Economical in this proceeding, has been advised that in the course of defending the tort claim, Economical obtained surveillance that shows the Claimant operating a vehicle. This surveillance has been produced to Mr. Dulude and his counsel in the context of the tort claim. Given the "ethical barrier" that is required to be kept between AB and BI departments of Ontario insurers, it has not been disclosed to counsel in this proceeding.

7. Mr. Frost seeks an Order from me directing the production of this surveillance to counsel in this proceeding. Mr. Blom consents to Economical's request for this Order, and has advised that he will comply with any order or ruling made.

8. Mr. Frost submits that this surveillance is relevant to this proceeding, as if it shows Mr. Dulude operating vehicles insured by Wawanesa after his employment ended, it would support his argument that a Wawanesa insured vehicle was made available for the Claimant's regular use at the time of the accident. It would also contradict Marc Dulude's sworn testimony at the EUO that he rarely drove his father's Hyundai, and did not have a set of keys for the vehicle.

9. Mr. Frost notes that the veracity of this evidence is already in question, in light of the surveillance obtained by his client in the process of adjusting the accident benefits claim. That footage shows the Claimant driving his father's Hyundai, which had been parked at his home overnight, on two occasions in August 2013. He submits that if the tort surveillance shows Mr. Dulude driving the Hyundai on other days, it would be directly relevant to the question of how "regular" his use of that vehicle was.

10. The Respondent, Wawanesa, objects to Economical's request for this Order. Its grounds for objection will be set out below.

11. Zoran Samac is counsel for Mr. Dulude in the tort claim. Mr. Dulude has not filed an objection to the proposed transfer of the claim as provided in section 5(3) of *Regulation 283/95* to the *Act* and is therefore not officially a "party" to this proceeding. Mr. Samac was nonetheless provided with notice of this motion and participated in a teleconference convened to discuss this issue. He also filed brief submissions on behalf of Mr. Dulude. He opposes Mr. Frost's request as well, and seeks an Order that Economical has breached the ethical barrier. He also seeks a declaration that its tort adjuster breached the "deemed undertaking rule" in section 30.1.01(3) of the *Rules of Civil Procedure*.

RELEVANT EVIDENCE:

12. This is the second motion brought by Economical seeking a production Order in this proceeding. After considering lengthy submissions filed by the Applicant and Respondent in 2019, I ordered Wawanesa to produce its underwriting records for the policy insuring the 2011 Hyundai Sonata driven by Jean-Claude Dulude. Mr. Frost referred to some of these documents in this motion to support his argument that a scheme was in place to provide the Claimant with regular use of a Wawanesa insured vehicle, with the full awareness of Pasquale Raviele, the 'directing mind' of Direct Upholstery Ltd., the named insured under the policy.

13. Mr. Frost highlighted handwritten notes on an email exchange between the broker who placed the policy and a Wawanesa representative, advising that the broker had spoken with Pasquale Raviele when the claim notice for the accident in question was received by Wawanesa. The notes refer to Jean Claude Dulude being a friend of Pasquale's for thirty years, to his son Marc having "no insurance and no vehicle", and that he "does not live with insured". The note refers to Marc's licence having been suspended for a "DUI – 2 years ago", and states that "son Mark sometimes drives Jean Claude to the hospital when he does not feel good…2 days a week, Jean goes to dialysis". The notation "2011 Hyundai" appears below these notes.

14. The underwriting material produced also contains a draft OPCF 28A Endorsement form that was filled out in late September and forwarded to Pasquale Raviele on October 11, 2013. It contains Marc Dulude's name as an Excluded Driver, and has signature lines at the bottom for "Pasquale" and "Jean Claude". It appears that neither party signed this document.

15. A log note dated November 15, 2013 states –

> *Pasquale will not co-operate and will not sign the form. Jean C Dulude said he will not let son Mark drive. Mark said he will not drive as he does not want to cause any problems for Direct Upholstery. Spoke to Dave @ Wawa Nov 14/2013, he said nothing we can do, if son does not live with the insured we will not be allowed to force him to sign the OPCF#28A. Leaving this activity till renewal.*

A further note dated August 22, 2014 states –

> *I am keeping this activity but we cannot follow up because Mr. Dulude or Pasquale will not co-operate and they will not sign the form.* ***Pasquale does not care what happens.***
>
> (emphasis added)

Lastly, a note dated January 28, 2015 states –

> *Pasquale called to say that Wawanesa called him indicating that son Marc had an accident (Dec 9/2014). Once again I warned Pasquale that son Marc cannot drive as he has no licence.* ***Pasquale agrees and wishes that his friend sells the car or insures himself. I told him he is the owner and he should make these decisions, he said forget I called and do not take any notice****. There are no injuries and the accident is minor.*
>
> (emphasis added)

RELEVANT PROVISIONS:

Arbitration Act

> ***17.*** *(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.*
>
> ***18.*** *(1) On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection.*

25. *(6) The parties and persons claiming through or under them shall, subject to any legal objection, comply with the arbitral tribunal's directions, including directions to,*

(a) submit to examination on oath or affirmation with respect to the dispute;

(b) produce records and documents that are in their possession or power

Rules of Civil Procedure

30.1.01 *(1) This Rule applies to,*

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

PARTIES' SUBMISSIONS:

Economical's submissions

16. Counsel for Economical contends that section 25(6) of the *Arbitration Act* provides me with the authority to compel the production of surveillance obtained by Economical in the tort

claim, as Economical is a "party" to this proceeding, and the Claimant is a "person claiming through or under" Economical. He also submits that section 18 of the *Act* provides an Arbitrator with the jurisdiction to order the "detention, preservation or inspection" of documents that are either the subject of the Arbitration, or as to which a question may arise in the arbitration, and contends that the surveillance file in question qualifies as such a document.

17. Mr. Frost submits that the production of the surveillance file would not violate the "deemed undertaking rule" in Rule 30.1.01(3) of the *Rules of Civil Procedure* reproduced above. He referred to the exception contained in subsection (4) that the rule does not prohibit "a use (of evidence) to which the person who disclosed the evidence consents", and noted that counsel for the tort defendant has provided his client's explicit consent to disclose the surveillance.

18. Counsel points to the further exception to the rule set out in subsection (6), which provides that the use of evidence obtained in one proceeding is not prohibited from being used in another proceeding if the evidence is used "to impeach the testimony of a witness in another proceeding". Mr. Frost contends that that is precisely why the surveillance is required, noting that if it shows Mr. Dulude operating vehicles insured by Wawanesa following the accident, after he no longer worked for a company owned by Mr. Raviele, it would impeach the testimony he provided at his EUO, when he stated that he rarely drove his father's vehicle.

19. Mr. Frost submitted that his client would be prejudiced in this proceeding if the tort surveillance was not produced, as it would hamper his efforts to prove that a scheme was in place to provide Marc with regular use of a vehicle insured under the Wawanesa policy. He contends that the log notes referred to above show a lack of credibility on the part of the Claimant, his father and Pasquale Raviele, and that Mr. Raviele was aware of the risk but "did not care what happens".

20. Counsel argued that as Mr. Dulude's accident benefits claim has been settled on a full and final basis, and the tort surveillance has already been disclosed to him in that proceeding, the Claimant would not suffer any prejudice by its disclosure here. He contended that the surveillance should be ordered to be produced as a matter of fairness, and in order to assist me in determining the issues in dispute.

21. Finally, counsel submitted that by completing the OCF 1 form, Mr. Dulude provided written consent to Economical to collect, use and share information and documents with other insurers or adjusters for the purpose of "recovering payment from insurers and others liable in law for the amounts paid" for Mr. Dulude's claims, as provided in Part 11 of that form. He contended that this further supports his request for the Order sought.

Wawanesa's submissions

22. Wawanesa's submissions focused solely on Economical's contention that sections 18 and 25(6) of the *Arbitration Act* provide me with authority to make the Order requested. Counsel noted that an Arbitrator conducting a proceeding under the *Arbitration Act* does not have the inherent jurisdiction of a court, and derives his or her jurisdiction solely from that Act and from the Arbitration Agreement signed by the parties. She contended that neither of these sources of jurisdiction provide an Arbitrator with the authority to issue orders that affect a non-party to the proceedings, and submitted that I therefore do not have the authority to grant the Order sought by Economical.

23. Ms. Lockwood cited various cases in support of the proposition that an Arbitrator cannot order relief that affects the rights of third parties who are strangers to the Arbitration agreement in a proceeding. [See *Seidel v Telus Communication Inc. (2011*) SCC 15, *Pirner v Pirner* [1997] O.J. No. 3098 and Justice Perell's decision in *Farah et al. v Savageau Holdings* (2011) ONSC 1819].

24. Counsel for Wawanesa also disputed Mr. Frost's submission that the surveillance being sought is in the possession of a "party" to this proceeding. She contended that Economical is not a party to the tort action, and that neither the Plaintiff nor Defendant in the tort action are parties to this arbitration proceeding. She argued that consequently, section 25(6) of the *Act* that provides that "parties and persons claiming through or under them" must comply with an Arbitrator's direction to produce records or documents in their possession or power, does not apply in these circumstances.

25. Ms. Lockwood acknowledged that section 18 of the *Act* provides an Arbitrator with the authority to Order the inspection of property or documents, but contended that that power only extends to a party to the proceeding. She argued that as the material sought by Economical is not in the possession of either the Applicant or Respondent in this proceeding, it is not in the possession of a "party" and that I therefore lack the authority to order its production.

Mr. Dulude's submissions

26. Counsel for Mr. Dulude adopted the submissions filed by Wawanesa.

27. Mr. Samac also referred to various emails that were forwarded to him by Mr. Frost's office. He noted that Mr. Frost wrote to a representative from Economical on February 20, 2020, and set out their full exchange in his submissions. Mr. Frost advised in his message that an "ethical barrier" between BI and AB departments of Ontario insurers prevents the sharing of contents or documents in the possession of one of those departments without the consent of all parties, or an Order from a court or Arbitrator. He stated that Economical's AB department had obtained surveillance on Mr. Dulude, and requested confirmation from the Economical representative whether surveillance was obtained of Mr. Dulude in the tort action, and if so, whether it showed him driving a vehicle. Mr. Frost explained that if such surveillance exists, he would seek an Order from me compelling its production.

28. The Economical representative confirmed by return email that surveillance had been obtained in the context of the tort claim, and that it did show Mr. Dulude driving a vehicle.

29. Mr. Samac claims that this communication between Mr. Frost and the Economical representative breached the ethical wall. He also submits that the disclosure of the existence of the surveillance by the Economical representative constituted a breach of the deemed undertaking rule. Counsel did not comment on the application of the exceptions to the "deemed undertaking rule" cited by Mr. Frost.

Reply submissions – Economical

30. Mr. Frost disputed Wawanesa's argument that the tort surveillance is not in the possession of a party to this proceeding, noting that the material is in Economical's possession via its tort counsel, who has consented to its production. He suggested that it was also in the possession of Mr. Dulude, as it has been disclosed to him in the course of the tort proceeding, and that he is a person "claiming under a party" as referred to in section 25(6) of the *Act.* Mr. Frost also contended that Mr. Dulude has been granted standing on this motion to make submissions, which effectively makes him a "party" to this proceeding. Counsel noted that in any event, a narrow interpretation of the term "party" is contrary to the intent of the *Arbitration Act*, which is to provide an Arbitrator with the jurisdiction to control his or her own process and make orders for the preservation and production of any relevant documents.

31. Finally, Mr. Frost disputed Mr. Dulude's counsel's submission that his client's actions in disclosing the existence of the surveillance breached the deemed undertaking rule in Rule 30.1, noting that there is an important distinction between seeking confirmation that surveillance exists, and asking that the contents of the file be disclosed.

ANALYSIS & REASONS:

32. Counsel for Economical suggests that the EUO evidence provided by the Claimant and by his father was not truthful in many respects, and that the tort surveillance sought may support Economical's contention that the parties engaged in a scheme to ensure that a vehicle insured by Wawanesa was made available for the Claimant's regular use at the time of the accident. He submits that I have the jurisdiction to compel production of this surveillance, that the 'deemed undertaking rule' in Rule 30.1.01(3) does not prevent me from doing so, and that a failure to make such an Order would result in prejudice to Economical, as it would hamper its ability to fully present its case.

33. As noted in my earlier ruling, the EUO evidence provided by Marc Dulude and his father was inconsistent on many points, and at times evasive. I indicated then that had it not been for these inconsistencies and the MTO records that clearly showed that the Claimant had been driving

his father's vehicle while his license was under suspension (despite initially denying that he did so), I would have agreed with Wawanesa's contention that Economical's request was akin to a "fishing expedition". It now appears that the underwriting records produced pursuant to that ruling have clarified that Mr. Dulude did in fact drive his father's vehicle without a valid driver's license, at various times after the accident, with the full awareness of the Wawanesa named insured. The records also show that the insurer requested that the parties sign an OPCF 28A Excluded Driver Endorsement form, but they refused to do so.

34. The above documents, like the surveillance obtained by Economical in the course of adjusting the AB claim, confirm that much of the evidence provided by the parties at their EUOs was either inaccurate or incomplete. Similarly, the tort surveillance may also help me to determine whether a vehicle insured by Wawanesa was made available for the Claimant's regular use at the time of the accident.

35. I consider the questions raised in this motion against that backdrop. The parties' submissions require that I determine who the "parties" are that are involved in this matter, and who are the persons "claiming through or under them" (as provided in section 25(6) of the *Arbitration Act*). I must also consider the scope of an Arbitrator's authority to order production from a third party who is not so described, and whether that is circumscribed by the "deemed undertaking rule" in Rule 30.1 of the *Rules of Civil Procedure.*

36. Counsel for Wawanesa cited the Supreme Court of Canada's decision in *Seidel v. Telus Communication, supra,* as authority for the proposition that arbitrators derive their jurisdiction solely from the applicable legislation and the Arbitration agreement signed by the parties, neither of which gives them jurisdiction to order relief that would bind third parties. The question of the arbitrator's jurisdiction in that case arose in the context of considering how a clause providing for mandatory arbitration to determine disputes arising out of a commercial contract should be interpreted, in light of provisions in British Columbia's consumer protection legislation.

37. I do not dispute the notion that an Arbitrator's jurisdiction is derived solely from the relevant Act or agreement signed by the parties. However, there is an important distinction

between an Arbitrator ordering relief that affects the rights of a non-party, and an Arbitrator compelling production of a document or surveillance file from a third party that is material to the issues in dispute. Production orders are provided routinely in the course of priority disputes under *Regulation 283/95* when documents such as tax returns or employment files are requested from third parties and the requests are not initially complied with. In the unlikely event that the third party objects to producing the material requested, they are given the opportunity to participate in the conversation and set out the reasons for their objection, after which the Arbitrator makes a ruling.

38. Counsel for Wawanesa also cited the decision in *Pirner v Pirner, supra.* The court in that case quashed an Arbitrator's award on the grounds that it effected the interests of third parties who were not parties to the arbitration. A senior judge who had agreed to act as an Arbitrator in a family law dispute issued an award that purported to secure child and spousal support owing by the husband against certain properties registered in the names of third parties. These parties contended that they had neither been provided notice of the proceeding, nor had agreed to be bound by the Arbitrator's ruling. In finding that the Arbitrator had exceeded his jurisdiction, the court stated that "an arbitral award which purports to dispose of the rights of non-parties to the arbitration constitutes an excess of jurisdiction rendering the award void". Again, there is an important distinction between "disposing of the rights of non-parties", and requiring a third party to provide documents or surveillance in their possession to assist in the determination of a dispute.

39. Wawanesa also relied on Justice Perell's decision in *Farah et al. v. Savageau Holdings, supra.* In that case, the applicants challenged an Arbitrator's jurisdiction to grant an interim injunction to the respondent, on an *ex parte* basis. The respondent had attended before the Arbitrator without notice to the applicants, and obtained an Order from him that effectively froze the applicants' assets. (referred to as a *Mareva* injunction). The Order directed all banks with whom the applicants dealt to "forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any accounts" and to "forthwith disclose and deliver up…all records held by the Banks concerning the Defendants' assets and accounts".

40. While there were many aspects to this complicated case, the part of Justice Perell's decision relied on by Wawanesa focuses on whether the Arbitrator had the authority to grant the *Mareva*

injunction, which had the effect of binding the banks, who were not parties to the arbitration. The court determined that the Arbitrator did not have such authority, and found that the Legislature has not provided arbitrators with injunctive powers over third parties. In his decision, Justice Perell acknowledged (at para 60) that section 18(1) of the *Arbitration Act* provides arbitrators with jurisdiction to make "detention, preservation and inspection of property orders" but states that that jurisdiction only extends to parties to the arbitration.

41. I note that Justice Perell omits any mention of, or reference to, an Arbitrator's authority to order the inspection of "documents", despite that term also appearing in section 18(1). I conclude from that omission that his comments above are clearly focused on an Arbitrator's jurisdiction to grant injunctions that affect third parties' rights or actions. He states – (at para.63)

> In my opinion, there is nothing in the *Arbitration Act, 1991* that empowers arbitrators to grant *Mareva* injunctions or for that matter appoint receivers, grant *Anton Pillar* orders, or grant *Norwich* orders. Granting an interlocutory injunction that requires financial institutions to prevent the removal of monies and assets and to disclose and deliver up records and report to a litigant, is not an order in which the arbitrator is ruling on the scope of the arbitration agreement or on the scope of his or her jurisdiction; it is an order in which the arbitrator purports to enjoin or direct the conduct of strangers to the agreement to arbitrate who are not bound by the jurisdiction of the arbitral tribunal.

42. As stated above, there is a significant difference between ordering third parties such as banks to freeze a party's assets or ordering that a receiver be appointed, and issuing an Order for production of certain documents that are in a third party's possession that are directly relevant to an issue in dispute. The judge's statement in the *Savageau* case was made in the context of an Arbitrator granting an *ex parte Mareva* injunction that gave sweeping directions to non-parties that had the effect of freezing the assets of two people. In my view, that statement cannot be interpreted as supporting the argument that arbitrator's have no authority to compel the production of relevant documents from a third party who has consented to them being produced, as is the case here.

43. Counsel for both insurers made detailed submissions on which entities are "parties" to this proceeding, and whether Mr. Dulude might be a "person claiming through or under" a party. This language appears in section 25(6) of the *Act* and requires these entities to comply with an

Arbitrator's direction to produce documents that are in their possession or power. Mr. Frost also contends that Mr. Dulude's participation (through his counsel) in this motion effectively makes him a party to this priority dispute. I disagree with this last proposition. Counsel who initially represented Economical in this dispute (not Mr. Frost) advised at the outset of the proceeding that Mr. Dulude had objected to the proposed transfer of his claim under section 5 of *Regulation 283/95*, but later confirmed that Mr. Samac had advised in writing that this was not the case. The fact that Mr. Samac was invited to provide his position on this motion was done out of courtesy, given that he had been advised that Economical would be requesting this Order and he made it known that he opposed it. His participation in this discussion does not grant Mr. Dulude the status of a "party" in this dispute, given his earlier statement that he was not objecting under section 5.

44. It is unclear to me whether in these circumstances, the part of Economical that is in possession of the tort surveillance is a "party" in this proceeding. The arguments on both sides of this issue seem tortured and distanced from reality. On the one hand, an insurer that provides a defence to its insured in a tort claim seems unlikely to be a party in a priority dispute under *Regulation 283/95.* On the other hand, it is the same entity in reality as the Applicant in this dispute, and it is only because of the "ethical barrier" noted above that Mr. Frost has brought this motion seeking an Order from me for production of the surveillance that is in his client's possession.

45. I find that section 18(1) of the *Act* is the more relevant provision and applies in these circumstances. It provides that an Arbitrator may make an Order for the inspection of documents "that are the subject of the arbitration or as to which a question may arise in the arbitration". Given my comments above regarding the veracity of the EUO evidence provided, I think it is fair to say that the surveillance sought may well address the question of whether or not Mr. Dulude had a vehicle insured by Wawanesa made available for his regular use at the time of the accident, which is the main issue in this dispute. I do not read the part of the provision that states that an Arbitrator may "order a party to provide security in that connection" as limiting my authority to direct a non-party to produce documents sought that are clearly relevant to this proceeding.

46. The question then becomes whether the "deemed undertaking rule" in Rule 30.1.01(3) of the *Rules of Civil Procedure* prevents me from making such an Order. In my view, it does not. Subsection (4) provides that the deemed undertaking not to use evidence for any purpose other

than those of the proceeding in which the evidence was obtained does not prohibit a "use to which the person who disclosed the evidence consents". As Mr. Frost noted, Economical's tort counsel has provided consent to the surveillance in question being disclosed.

47. More importantly, subsection (6) provides that the 'deemed undertaking' does not prohibit the use of evidence obtained in one proceeding to impeach the testimony of a witness in another proceeding. As noted above, this is precisely the reason the surveillance is sought by Economical. I find that this provision is a full answer to Mr. Samac's contention that Economical breached Rule 30.1.01 in this case. As noted above, he did not provide any response to Economical's contention that subsection (6) applies in these circumstances, and Wawanesa chose to focus its submissions solely on the breadth of my jurisdiction under the *Arbitration Act*.

48. Finally, I agree with Mr. Frost's contention that there was nothing improper about the email exchange he had with the Economical representative, set out in Mr. Samac's materials. A close review of the exchange reveals that Mr. Frost was careful to emphasise that he was inquiring into whether surveillance had been obtained in the tort claim, rather than asking about the contents of the surveillance report and what it showed. In the circumstances, I find that there is no basis for Mr. Dulude's contention that the ethical wall between tort and AB departments was breached, or that Economical's counsel and its tort adjuster breached the deemed undertaking rule.

49. For all of the reasons set out above, I grant Economical's request for an Order that the surveillance obtained by Economical in the tort claim brought by Mr. Dulude be produced to counsel in this proceeding.

ORDER:

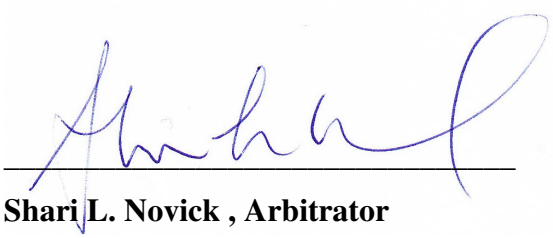
Economical is hereby ordered to produce the surveillance records it obtained of Marc Dulude in the course of defending the tort claim on behalf of the driver involved to counsel for both insurers involved in this proceeding, within thirty (30) days.

COSTS:

As the successful party on this motion, Economical is entitled to recover its costs related to this aspect of the dispute on a partial indemnity basis. If counsel cannot agree on the quantum owing, I invite them to contact me so that a teleconference can be arranged at which submissions will be heard.

My account for time spent to date, including the writing of this award, will be sent to the parties shortly. I look forward to speaking with counsel for both insurers on at our next pre-hearing call, scheduled to take place on October 1, 2020 at 9:30 a.m.

DATED at TORONTO, ONTARIO this ___9th___DAY OF SEPTEMBER, 2020



Shari L. Novick , Arbitrator