

**IN THE MATTER OF SECTION 275 OF THE *INSURANCE ACT*, R.S.O. 1990, AND  
*ONTARIO REGULATION 664***

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

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**WAWANESA MUTUAL INSURANCE COMPANY**

**Applicant**

- and -

**ZURICH INSURANCE COMPANY LTD**

**Respondent**

**PRELIMINARY DECISION – DISPUTED PRODUCTIONS**

**COUNSEL:**

Katherine E. Kolnhofer and Brenda Cuneo for the Applicant

Kevin S. Adams for the Respondent

**BACKGROUND:**

1. Wawanesa seeks indemnification from Zurich for accident benefit payments it has made to Kara Blackwood, resulting from injuries she sustained in an accident on October 6, 2014. A truck insured by Zurich collided with Ms. Blackwood's vehicle, causing injuries to her and two other passengers. The parties agree that the Loss Transfer provisions in section 275 of the *Act* apply, and that the Zurich insured driver was 100% at fault for the accident. Wawanesa sent Loss Transfer Request for Indemnification notices to Zurich, and Zurich has made payments in the amount of \$46,792.08 to date.

2. Ms. Blackwood was involved in two other motor vehicle accidents – one in June 2013, and one approximately nineteen months following the accident referred to above, in May 2016. She sought and received benefits from Belair Insurance for injuries sustained in the first accident in 2013. She subsequently obtained insurance coverage with Wawanesa, and Wawanesa paid benefits to her arising from both the 2014 and 2016 accidents. Ms. Blackwood was deemed to be catastrophically impaired pursuant to the *SABS* in April 2017, as a result of injuries suffered in the October 2014 accident. This determination was based on a psychiatrist's finding that she suffered from a Class 4 "marked impairment" in her activities of daily living.

3. A settlement of all three of the Claimant's accident benefit claims was negotiated at a global mediation held in August 2017. Wawanesa paid a total of \$750,000 in exchange for a full settlement of all claims related to the 2014 accident (including \$10,000 for costs and disbursements). It also paid \$20,000 in exchange for a final settlement of all claims related to the 2016 accident (also including an amount for costs and disbursements).

4. Wawanesa delivered its final Loss Transfer Request for Indemnification to Zurich in February 2018, seeking \$801,822.28 (incorporating the \$750,000 lump sum amount noted above). Zurich resists repaying the full amount claimed, and alleges that certain payments were either unreasonably made by Wawanesa, or are not subject to the Loss Transfer provisions in the *Act*. Zurich also submits that some of the benefits paid to Ms. Blackwood were improperly apportioned to her claims arising from the 2014 accident in issue.

**PRODUCTIONS DISPUTE:**

5. Zurich requested production of various documents from Wawanesa at the outset of this matter, including a decoded summary of benefits paid to Ms. Blackwood for both the October 2014 and May 2016 accidents, its complete accident benefits claims files for both accidents, as well as all reports, calculations and summaries compiled to assist in determining its exposure to pay benefits, for both accidents. Wawanesa initially advised that it was agreeable to producing all relevant documents related to the 2014 accident, but resisted producing any documents related to the 2016 accident.

6. Counsel have filed and exchanged extensive written submissions on Zurich's entitlement to the material sought regarding Ms. Blackwood's 2016 accident, with supporting case law, and have requested a written ruling. I will briefly summarise the parties' positions on this issue and provide my ruling, with reasons, below.

7. While it initially appeared that there was no dispute about Zurich's entitlement to the documents it sought related to the Claimant's 2014 accident, it became evident after several exchanges over the last month that the parties do not agree on the breadth of this production. Counsel for Zurich has requested that I issue production orders with respect to these documents as well, and that Wawanesa be permitted to outline any objections it may have to producing certain documents on the grounds of privilege, at a later date. I have set out the documents that remain outstanding below, to the best of my knowledge, and have ordered Wawanesa to produce much of the required material.

**PARTIES' POSITIONS – DOCUMENTS RELATED TO MAY 2016 ACCIDENT:**

*Zurich's submissions*

8. Counsel for Zurich submits that he should be entitled to review Wawanesa's complete claims files and adjusting notes for both the 2014 and 2016 accidents, in order to determine whether the payments made to Ms. Blackwood, particularly the lump sum settlement payments negotiated at the global mediation in August 2017, were appropriately apportioned between the two claims.

9. Mr. Adams contends that the claims file related to the 2016 accident likely contains information that is relevant to the central issue of whether the payments that Wawanesa seeks reimbursement for in relation to the 2014 accident were reasonably made. He argues that it would be unfair to permit Wawanesa to shield the information contained in that second claims file from disclosure, given the heavy onus of proof that rests with his client, as a second party insurer challenging the reasonableness of payments made, in this case.

10. Mr. Adams referred to *Bulletin A-11/94* issued by the Ontario Insurance Commission (later known as the Financial Services Commission of Ontario) in support of his contention that a second party insurer may contest the reasonableness of payments made by the first insurer seeking indemnity. He submitted that the reasonableness inquiry in this case includes whether Wawanesa properly apportioned benefits as between the Claimant's two claims, and whether the large six-figure amount paid to resolve the claim arising from the 2014 accident for which Wawanesa may seek re-imbursement from Zurich, was appropriate in the circumstances.

11. Counsel noted Arbitrator Samis' comments in *Royal & SunAlliance v. Wawanesa Mutual Insurance Company* (April 17, 2012) that a "relevance" test should be applied to the question of pre-hearing disclosure in a Loss Transfer dispute, and that "if a document is not protected from production by some privilege, and it is relevant to an issue between the parties, it should be produced". He also noted that Arbitrator Samis determined that all documents relevant to a Loss Transfer dispute, including internal documents that convey an understanding of the basis of the claims handling decisions and that "shed light on the determination of a lump sum allocation", should be produced.

#### *Wawanesa's submissions*

12. Counsel for Wawanesa contends that the claims documents and adjusting notes sought by Zurich relating to the 2016 accident are not relevant, as the payments made to Ms. Blackwood arising from the injuries she suffered in that accident are not the subject of this dispute. She characterised the request made by counsel for Zurich as a "fishing expedition", and noted that none of the cases cited by counsel support his blanket request for productions.

13. Ms. Kolnhofer submitted that the May 2016 accident was a “minor rear-end collision”. She attached the OCF 3 (Disability Certificate) filed shortly after that accident, in which Ms. Blackwood’s injuries are described as sprains and strains of her cervical, thoracic and lumbar spine, ribs and sternum, and headaches. She also attached a note made by the Wawanesa adjuster assigned to the 2014 claim, noting counsel for the Claimant’s comment at the mediation that he did not see the 2016 accident as giving rise to a “significant claim”. Given the above, counsel contended that the evidence at hand does not support that Ms. Blackwood’s 2016 accident was “of any consequence whatsoever” to the claims related to her 2014 accident.

14. Counsel also noted that the decisions referred to in Zurich’s materials<sup>1</sup>, in which arbitrators were asked to review the first insurers’ decisions to allocate lump sum settlement amounts between one accident for which loss transfer indemnity could be claimed, and one for which it could not, did not contain any discussion of the productions that the insurer seeking indemnity was required to produce. She contended that these decisions were therefore of no assistance.

15. Finally, counsel for Wawanesa noted that Mr. Adams had included a copy of the Mediation Memorandum prepared by his office for the global mediation that took place in August 2017 (to which he was invited, but for which the material was not provided to the parties, at Wawanesa’s request), as well as a copy of the Mediation Memorandum prepared and filed by her office, in his materials. She requested that I not review these materials, and submitted that they should not be considered in this motion, as they are protected by privilege that has not been waived.

*Reply submissions*

16. Mr. Adams submitted that the fact that Wawanesa referred to the documents above related to the Claimant’s 2016 accident essentially acknowledges that they are relevant to the issues in this dispute. He questioned Ms. Kolnhofer’s suggestion that Ms. Blackwood

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<sup>1</sup> *State Farm Automobile Insurance v. Economical Mutual Insurance* (Sampliner, July 17, 2018) and *Primum Insurance v. Aviva Canada* (Jones, March 4, 2008).

suffered only minor physical injuries in that accident, but contended in any event that the details of her claims arising from that accident would be relevant, given that she was determined to be catastrophically impaired in 2017, after the 2016 accident had occurred, and that the basis for that finding was psychological rather than physical.

*Primum v L'Unique Assurance decision*

17. A few weeks after Zurich filed its Reply submissions, Mr. Adams forwarded a copy of the Ontario Divisional Court's appeal decision in *Primum Insurance Company v. L'Unique Assurances Generales Inc.* (2017) ONSC 5235 (CanLii) that had just come to his attention. When Ms. Kolnhofer questioned the relevance of this decision, and suggested that it had no bearing on the issues in this case, Mr. Adams replied with brief submissions on why he thought the court's ruling was relevant to the issues raised here.

18. I have reviewed this decision, and do not find the court's ruling to be applicable to the question of whether the documents sought by Zurich in this case, relating to Wawanesa's adjusting and settlement of Ms. Blackwood's 2016 accident, should be produced. The above case arises from a situation in which the son of two Primum policyholders was struck by a vehicle insured by L'Unique. The claimant's father was a named insured under a Primum policy that insured (only) his motorcycle. The other policy, issued to his mother, insured two other vehicles used in the household. The son's claim for accident benefits was made under the father's motorcycle policy, and Primum sought indemnity from L'Unique under the "Loss Transfer" provisions in the Act for the benefits it had paid, in accordance with section 9(2)(a) ii of *Regulation 664*.

19. An Arbitrator was appointed to hear the matter. L'Unique brought a pre-hearing motion seeking various documents from Primum relating to how the claim came to be adjusted under the father's motorcycle policy. L'Unique also requested information regarding how *SABS* claims are generally treated when an insured may make a claim under more than one policy. The Arbitrator dismissed the motion, and L'Unique appealed this ruling to the Divisional Court. The Court granted the appeal relating to three of the four items sought, and ordered Primum to provide the relevant information and documents.

20. Mr. Adams suggests that the issues in that case parallel those raised here. I do not agree. The Court's decision focuses to a large extent on its determination that the Arbitrator had conflated the issues and procedures in a Priority Dispute and a Loss Transfer claim between two insurers, and the effect of that error, particularly in regard to the evidentiary burdens faced by parties in a Loss Transfer case. In my view, the fact that an insurer who paid benefits under one of two possible policies was required to produce documents and provide evidence related to why it chose to do so, is appreciably different from the question posed here.

21. In the *Primum* case, the decision to claim benefits under one parent's policy rather than a second parent's policy had the effect of determining whether the right to seek indemnity under section 275 of the *Act* existed. In this case, the production dispute centers on whether Wawanesa should be compelled to disclose documents relating to a claim for injuries sustained in an accident a year and a half after the accident in issue, in a circumstance where both claims were settled at a global mediation. In the first case, the question to be determined was whether Primum should be entitled to seek indemnity at all, whereas the issue in this case comes down to whether the payments made by Wawanesa were reasonable.

### **ANALYSIS & REASONS:**

#### ***Request for production of documents sought related to 2016 accident***

22. I find that the documents requested by Zurich related to Ms. Blackwood's 2016 accident should be produced by Wawanesa. I agree with Arbitrator Samis' comments in *Royal and SunAlliance v. Wawanesa, supra*, to the effect that the test to apply for disputed production requests in a Loss Transfer proceeding is "relevance", and that if a document is not protected from production by some privilege, and it is relevant to an issue between the parties, it should be produced.

23. In my ruling on a production dispute in *Portage La Prairie Mutual Insurance Company v. Royal & SunAlliance Insurance Company of Canada* (February 13, 2017), I adopted Arbitrator Samis' statement in the above decision that any 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 should be produced. Applying those principles here, I find that the documents sought by Zurich are relevant to this dispute, as they may assist in clarifying how and why Wawanesa made the decisions it did to resolve both of Ms. Blackwood’s claims for the settlement amounts noted above.

24. I add at this point that this ruling does not mean that the material related to the 2016 accident will ultimately be important to, or dictate the determination of the main issue in dispute between the parties. A production ruling in this type of case is essentially an attempt to create a ‘level playing field’ between the parties and to provide the responding insurer, who is being asked to pay a large sum to the first insurer without having been involved in the adjusting decisions made on a claim, with much of the same material available to the first insurer, so that they can assess whether to challenge the indemnity claims being made.

25. In many cases, the fact that a claimant was involved in another accident either before or after the one that is the focus of a Loss Transfer proceeding may not be relevant to the question of whether the payments for which reimbursement is being sought were reasonable. I find, however, that there are some unique facts in this case that merit a wider scope of production. Wawanesa settled both Ms. Blackwood’s claim arising from the 2014 accident (the focus of this dispute) and the second one arising from her 2016 accident (that is not subject to a Loss Transfer claim) at the same global mediation. The accidents were approximately nineteen months apart, and the relative settlement amounts were dramatically different - as set out above, Wawanesa seeks indemnity from Zurich for over \$800,000 (in addition to the approximately \$47,000 already paid) in relation to the 2014 accident, while only \$20,000 was paid to settle all claims arising from her 2016 accident.

26. The determination that the Claimant met the definition of catastrophic impairment under the *SABS* in relation to injuries suffered as a result of the 2014 accident was not made until 2017, almost one year after she sustained further injuries in the accident of May 2016. This determination was based on assessments done after this second accident, and was based on a finding by a psychiatrist that Ms. Blackwood experienced a “Class 4 marked

impairment” in the realm of her activities of daily living. In my view, this raises questions about the cause and timing of symptoms or injuries experienced by Ms. Blackwood, and whether they can clearly be attributed to one accident or the other, which would likely not arise if she had experienced physical or orthopaedic injuries in the 2014 accident that were distinct from the reported injuries in the 2016 accident.

27. In summary, I find that when a second insurer contests the reasonableness of payments made by a first insurer seeking re-imburement for those benefits paid, it is entitled to review the documents that shed light on the adjusting decisions made, subject to claims of privilege. Usually, the focus will only be on documents related to the accident in question, but, in a scenario where one claim is resolved with the Claimant in exchange for a large six-figure lump sum, while a second claim related to an accident nineteen months later (for which no claim for indemnity is available under the provisions) is settled for a modest sum at the same time, as is the case here, any relevant documents sought that are related to both claims should be produced.

28. It may well be that the decisions made by Wawanesa in settling both claims were entirely reasonable and justified. In order to determine that question, however, there must be a level of transparency regarding how and why those decisions were made. The only way to achieve that is to require Wawanesa to produce all relevant documents sought by Zurich related to Ms. Blackwood’s 2016 accident, subject to claims for privilege, despite those claims not being the focus of this dispute.

*Should the Mediation material filed be excluded?*

29. Zurich filed various documents in support of its position, including the Mediation Memoranda prepared by both Wawanesa and Zurich for the global mediation that took place in August 2017, at which the claims were settled. Counsel for Wawanesa contended that these materials should not be accepted into evidence on this motion. Given this objection, I have not reviewed these materials to date. I am not persuaded that that they are relevant to the question of Wawanesa’s obligation to produce the documentation relating to the 2016 accident, and make no further comment on this issue.

***Request for production of documents related to 2014 accident***

Much of the material requested by Zurich related to Ms. Blackwood's 2014 accident has been provided by Wawanesa. I am advised that the following items remain outstanding:

- (i) ***Detailed summary of benefits paid*** - Zurich has asked for a decoded summary of payments made to Ms. Blackwood, noting the date, amount, payee and type of benefit or expense it addresses. Wawanesa has agreed to produce this, but has not done so to date. **I order that a summary of payments made containing the above details be produced to Zurich by no later than February 1, 2019.**
- (ii) ***Documentation regarding proof of payments made*** – these documents should also be provided. **I order Wawanesa to provide these documents to Zurich by February 1, 2019.**
- (iii) ***Documents related to Wawanesa's determination/calculation of the Claimant's eligibility for benefits, including attendant care and housekeeping*** – to the extent that these exist and are not subject to a claim for privilege, such notes or documents would illuminate claims handling decisions and are therefore relevant. **I order Wawanesa to produce any such documents to Zurich by February 15, 2019.**
- (iv) ***Information / documentation related to investigations conducted re claims or the Claimant*** - this material would likely have also informed claims handling decisions and is therefore relevant. **I order Wawanesa to provide any summary reports of investigations done to Zurich by February 15, 2019.**
- (v) ***Documents indicating payment of interest and taxes to or on behalf of Claimant*** – this should be included in the summary of payments made in paragraph (i).
- (vi) ***Information / documentation pertaining to collateral benefits available to the Claimant and what investigations were done in that regard, if any*** – this is also relevant and should be provided. **I order Wawanesa to provide any documents or information in its possession related to the collateral benefits available to the Claimant, and any investigations it conducted, to Zurich by February 15, 2019.**
- (vii) ***Reports, calculations and summaries assisting in determining exposure to benefits/expenses and resolution value for claims*** – counsel for Zurich noted that the Index of documents provided by Wawanesa lists two reports generated by Thomson Rogers (counsel for the Claimant), but no reports generated by Wawanesa. Counsel for Wawanesa has advised that her client is

not agreeable to producing any privileged documentation, including legal opinions or reports prepared for the purpose of mediation.

**I order Wawanesa to provide a list of documents under this heading that it submits are privileged and not subject to production to Zurich by February 1, 2019. A teleconference will be scheduled shortly after that, at which I will hear submissions on this point.**

(viii) *Copies of offers, demands, expense/disbursement summaries and notes (or other docs) detailing the negotiations resulting in the full and final settlement of the claims* – Wawanesa has advised that there were no settlement offers exchanged prior to mediation, and that the adjuster’s notes from the mediation have already been produced. Counsel for Zurich noted that the notes provided are mostly redacted, and the portion produced consists of only five lines and contains no information regarding offers exchanged.

**I order Wawanesa to produce a copy of any disbursement list it obtained from Ms. Blackwood’s counsel prior to the settlement being reached.**

**I decline to order the production of any further documents under this heading at this time. I have not been advised of the reason for the extensive redactions in the adjuster’s notes. If Zurich would like to challenge the basis for the redactions, I will hear submissions on this point at a teleconference to be scheduled.**

**ORDER:**

The documents ordered to be produced related to the 2014 accident have been detailed above.

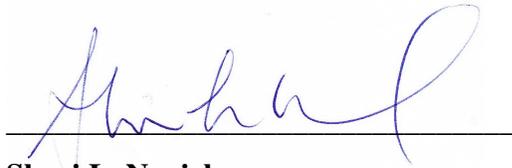
In keeping with my above ruling regarding the documents sought relating to the May 2016 accident, I also order *Wawanesa to produce all documents related to Ms. Blackwood’s claims arising from her accident in May 2016, as set out in paragraph 64 of Mr. Adams’ written submissions dated November 7, 2018, subject to any claims of privilege.* These documents should be produced within thirty days of this decision. A list of all documents over which privilege is being claimed should also be provided to Mr. Adams within thirty days, and if any disputes arise regarding the producibility of those documents, they will be addressed at a further teleconference.

**COSTS:**

As Zurich has been largely successful on this motion for productions, it is entitled to its costs on a partial indemnity basis. I will address any arguments related to the quantum of costs payable at the conclusion of this matter.

I also find that Wawanesa is responsible to pay the bulk of my arbitration fees related to the preparation of this decision. As the productions issues have not yet been fully resolved, I have split my account equally between the parties, and will make any necessary adjustments at the end of this process.

**DATED at TORONTO, ONTARIO this \_\_\_25<sup>th</sup> \_\_\_DAY OF JANUARY, 2019**



**Shari L. Novick  
Arbitrator**