

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c l.8 (as amended)
AND IN THE MATTER of O. Reg 283/95 (as amended)
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17 (as amended)

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

Applicant

- and -

THE WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRODUCTION MOTION

Counsel Appearing:

Debbie Orth: Counsel for Insurance Corporation of British Columbia (hereinafter called ICBC)

James Schmidt: Counsel for Wawanesa Insurance Company AB (hereinafter called Wawanesa AB)

Catherine Korte: Counsel for Wawanesa Mutual Insurance Company tort (hereinafter called Wawanesa tort)

Background:

This production motion arises out of a priority dispute involving AD (hereinafter called the claimant) who was involved in an accident on April 27, 2021.

The claimant was a passenger in his brother's car insured by Wawanesa that was being operated in Ontario when the accident occurred.

However, the claimant was a listed driver on an ICBC policy. Wawanesa received the first OCF-1 and took the position that ICBC stood in priority.

ICBC sent a letter dated September 20, 2021 together with a Notice to Applicant of Dispute between Insurers to ICBC. In that letter, Wawanesa indicated that the OCF-1 had been received by their office on August 6, 2021. They enclosed a copy of the OCF-1 in that letter.

Based on that information, ICBC accepted priority and did not raise any preliminary issues. ICBC then received a copy of Wawanesa's Accident Benefit file. In that file was a letter dated May 13, 2021 from Preszler Injury Lawyers directed to Wawanesa Mutual Insurance Company enclosing an OCF-1.

ICBC then commenced this priority dispute taking the position that the OCF-1 had been received by Wawanesa on May 13, 2021 and not on August 6, 2021 as alleged in their Notice letter, and, accordingly, Wawanesa had not met the 90-day requirement.

In the course of exchanging productions with respect to the issue raised by ICBC, Wawanesa took the position that while there was a letter dated May 13, 2021 with the OCF-1 that had not in fact been received by Wawanesa and that the first time they received the OCF-1 was in fact on August 6, 2021, as alleged.

It was the documentation exchanged on this narrow issue that resulted in ICBC bringing the within production motion as against Wawanesa AB and Wawanesa tort.

Order Sought:

The Notice of Motion of ICBC seeks some very broad relief:

1. An Order requiring The Wawanesa to produce and provide all Adjuster notes, including those of Ryan Haase, from the inception of the subject claim file up to and including August 9, 2021.
2. An Order to produce all documents received in the tort action from the inception of the accident up to and including May 31, 2021.
3. An Order requiring The Wawanesa to advise as to the procedures in place with respect to the reception of fax documents and the reception of OCF-1 forms and to produce such documents that would have been created as a result of those procedures for May 13, 2021 and May 14, 2021.
4. An Order to provide the document generated by the fax machines receiving incoming faxes to fax number 416-228-7828 which would record the specifics of the incoming faxes received.

Wawanesa AB took no position on this motion. However, Ms. Catherine Korte was retained by Wawanesa tort and opposed the production of primarily the tort log notes based on litigation privilege. This arises from the fact that Ryan Haase is a tort adjuster and the letter from Preszler Injury Lawyers to Wawanesa dated May 13, 2021 purportedly sending in the OCF-1 was directed to Mr. Haase at Wawanesa. The fax number shown on the Preszler Injury Lawyers' cover letter is 416-228-7828.

Relevant Facts Provided by the Parties:

Firstly, Ryan Haase is a tort adjuster and has no involvement in the Accident Benefit file.

The letter of May 13, 2021 is clearly sent to the attention of Ryan Haase. It indicates that there is an OCF-1 Form being enclosed as well as an authorization. The letter is authored by a licenced paralegal at Preszler Injury Lawyers. The copy of the letter produced for this motion included a copy of the authorization and a copy of the OCF-1, which was signed by the claimant and dated May 13, 2021.

There is a fax cover sheet which shows that there are a total of 9 pages being transmitted. There is the coversheet, the letter, and the 7 pages of enclosures. Again, the fax number that is indicated on the coversheet that is being transmitted is 416-228-7828 and it is to the attention of Ryan Haase at Wawanesa. The evidence was that, that fax number is not specific to Ryan Haase but is the general fax number for the Ontario branch of Wawanesa.

Also produced was a copy of the transmission report ostensibly confirming a successful transmission of the fax to Wawanesa. However, there is clearly something wrong with the transmission report as it referenced that the date the transmission took place was January 25, 2000 which is clearly an inaccurate date.

However, the document does confirm that 9 of 9 pages were sent at 8:30-35 p.m. The duration of the fax is 4 minutes and 41 seconds. The result is noted as CP14400. According to the abbreviations, CP means completed.

Based on all the evidence placed before me at the motion hearing, there appears to be no other conclusion other than this document was faxed on May 13, 2021 in the evening and all 9 pages were sent.

However, there is no evidence that this document was "received" by Wawanesa and Wawanesa in fact denies that it ever received this fax on May 13, 2021.

An Affidavit was filed by Wawanesa tort to support their position that the OCF-1 was not received by the tort adjuster. It should be pointed out that Wawanesa tort takes no position as to what actually happened to the OCF-1 and whether it was received elsewhere within Wawanesa.

A copy of a series of emails between Preszler Injury Lawyers and Mr. Haase were produced.

On July 16, 2021, a lawyer at Preszler Injury Lawyers emailed Dr. Mike Takes who is a medical director working with Preszler Injury Lawyers. In that email the lawyer indicates that he had spoken to an individual who was coordinating treatment for the claimant. She said she had an OT lined up and was ready to start, however, when she called ICBC they advised her that the claim needed to be made with Wawanesa (claimant's brother's insurance). Then when she called the adjuster at Wawanesa, she was told she needs to proceed via ICBC. This is consistent with the AB log notes which indicates that the AB adjuster received a call from the OT on July 8, 2021 and there was some discussion about ICBC at that time. I should point out that the log notes produced from the AB perspective do not show any indication of an OCF-1 being received on the AB side until August 6, 2021.

In response to the above noted email, Dr. Takes then emails Mr. Ryan Haase. There is no explanation as to how Mr. Haase's name was the one that Preszler Injury Lawyers used but I do not see any particular relevance in that. The email was sent to Mr. Haase on July 16, 2021 and it noted that the claimant's rehab team had reported that they were having difficulty in submitting OCFs. The email goes on to say that the law firm had submitted an OCF-1 on May 13, 2021 and there was a note asking whether it needed to be re-sent.

Mr. Haase then immediately emailed Lauren Auld who is the AB adjuster. Mr. Haase's email says to her that he believes this is with respect to Accident Benefits and therefore would be for her and asks her to confirm and respond to the matter.

In addition, in the Affidavit material filed by Wawanesa tort, another email is reproduced that Mr. Haase had generated. This is once a more formal request for production of the tort log notes had been received. I quote the relevant part of the email below:

"I am unable to forward you my log notes. I suspect I would need court direction to be able to accommodate that request.

In the meantime, I have reviewed the claim and can confirm there are no notes regarding receipt of the OCF-1 Application. The first item I received related to the AB file was the email you attached in your request dated July 16, 2021".

The last relevant fact is the actual log notes that had been produced from the AB adjuster. A review of those log notes suggests that Wawanesa was aware of a potential of a claim on May 4, 2021. The note indicates that a claim was assigned to Lauren at that time. There were some phone calls with the claimant that took place on May 4 and May 6 of 2021. There are some redactions early on but I am advised those are with respect to other claimants. We then have the note from Ms. Auld of August 6, 2021 in which she indicates:

“On July 16, 2021 I both spoke to and emailed AD’s LR who indicated they would be sending in an OCF-1 for AD, however to date one has not been received. I therefore emailed LR again asking whether they will be sending the OCF-1 and if so, to provide some dates to obtain a priority statement”.

In a log note of August 9, 2021, it is indicated by Ms. Auld that the OCF-1 has now been received.

Decision regarding Productions:

Counsel for ICBC argued that I should not accept the evidence presented by Wawanesa wherein Mr. Haase advised that there were no notes in his log notes regarding the receipt of the OCF-1 Application. Counsel argued that I should look carefully at the wording of that and whether or not Mr. Haase is limiting his comments about receiving an OCF-1 and arguing that the log notes should be looked at for other issues relating to the AB Application rather than just receiving it.

Wawanesa tort’s primary argument on the production of the log notes was that litigation privilege protected the log notes and if I Order production, Wawanesa tort would not be able to rely on the valid protections surrounding that litigation privilege.

I have concluded that the evidence before me is more than sufficient to satisfy that while there was a letter dated May 13, 2021 with an OCF-1 that was allegedly faxed to Mr. Haase that there is simply no evidence that he received that letter when it was sent.

I am satisfied that Mr. Haase has provided sufficient information with respect to his involvement or lack thereof in the OCF-1 and that there was no need for any further log notes to be produced.

However, I agree with counsel for ICBC that there is a very live issue as to what happened to the May 13, 2021 fax from Preszler Injury Lawyer’s office on May 13, 2021. As I noted, the fax confirmation sheet other than having the wrong date seemed to support that the fax itself was confirmed and completed around 8:30 p.m. on the night of May 13, 2021. I appreciate that it is a general fax number and not Mr. Haase’s personal fax number. However, there was no evidence before me as to what happens to a fax when it is sent to the general fax number 416-228-7828. Is there some record of faxes that are received each day? Normally each fax machine will produce a “batch” report of faxes received on a daily basis. Production of this would assist in determining whether the fax actually went through to Wawanesa as suggested in the fax confirmation sheet subject to the error with respect to the date.

I also find that its relevant to make inquires of the appropriate representative of Wawanesa as to what happens to a fax when it is received at the general fax number. Is there someone there who sorts the faxes out and then directs it to whom it is directed, which in this this case would be Mr. Haase? Is some thought put into this so that if the individual recognizes that it is an AB related matter and knowing that Mr. Haase is a tort adjuster that it would be redirected elsewhere?

These and many other questions could be answered through a brief examination under oath of an appropriate person from Wawanesa who would have this information or at least be able to give undertakings to inquire to others with respect to that information.

As ICBC has accepted priority based on the representations made by Wawanesa in their letter of September 20, 2021, then I feel ICBC has the right to make further inquiries to ensure that those representations are accurate.

Order:

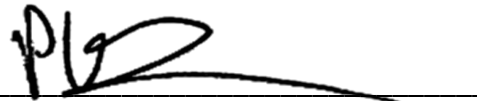
I dismiss the motion of Wawanesa with respect to items 1 and 2. With respect to item 3 I am Ordering that Wawanesa produce the appropriate individual to answer relevant questions as to the procedures in place for receiving fax documents and specifically an OCF-1 on May 13 and May 14, 2021.

With respect to item 4 I am Ordering that Wawanesa AB produce any documents that would be generated by the fax machine to show what incoming faxes were received at the general number on May 13 and May 14, 2021.

Costs:

I have not made any Order with respect to legal costs or Arbitration costs but I have invited counsel to make submissions should they wish to argue this point.

DATED THIS 17th day of August, 2023 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written over a horizontal line.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP