IN THE MATTER OF an Arbitration under the *Arbitration Act*, 1991 and pursuant to the provisions of Section 268 of the *Insurance Act* and Ontario Regulation 283/95 thereunder

AND IN THE MATTER OF an Arbitration

BETWEEN:

ROYAL & SUN ALLIANCE INSURANCE COMPANY

Applicant

- and -

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

DECISION

Counsel Appearing:

Derek Greenside: Counsel for Royal & Sun Alliance Insurance Company (hereinafter referred to as Royal)

Daniel Strigberger: Counsel for The Co-operators General Insurance Company (hereinafter referred to as Co-op)

Background:

On October 6, 2017, DJ was involved in a motor vehicle accident. Co-op insured DJ. However, Co-op takes the position that on the date of loss there was no Accident Benefit coverage as DJ had removed road coverages from his vehicle and only had comprehensive coverage. Co-op has acknowledged, as an Agreed Fact, that they did not offer an OPCF-16 to DJ when he called to remove the road coverage from his policy. It is further agreed that there was no OPCF-16 placed on DJ's policy when the changes were made to his policy.

When this accident occurred, DJ was a passenger in a taxi. Royal insures the taxi. DJ applied to Royal for Statutory Accident Benefits. Royal takes the position that Co-op is the priority insurer and the grounds for that argument include inter alia, that providing an OPCF-16 to DJ was required by law at the time and the failure to do so means that DJ's coverage was not properly reduced. One of the questions that I will be asked to determine in the Arbitration is:

Can motor vehicle liability coverage be validly reduced to comprehensive coverage only without the use of the OPFC-16 form". If I find that the OPCF-16 form was not mandatory then I will also be asked to determine the following "was there an agreement between DJ and Co-op to remove the road coverage from his policy in November of 2015? Would he have purchased the OPCF-16 if it was explained and offered to him?"

It is in this context that this motion with respect to productions has been brought.

Issue – Disputed Productions:

This case was originally before another Arbitrator. According to documents provided to me during the course of this production hearing, the previous Arbitrator determined that (and I quote):

> "I am of the opinion that it could be relevant to the issues in dispute to know whether Co-operators had a policy or procedure in place that was to be followed by its employees in the event an insured contacted Co-operators to inquire about changing coverage on a motor vehicle liability policy to reduce the premium cost. Specifically it could be relevant to know whether Co-operators employees were to follow a specific procedure in the event that the insured sought to reduce coverage under motor vehicle liability policy to comprehensive coverage in an effort to lower the premium cost."

To provide further context this issue appears to have been raised when it was determined by counsel for Royal that Royal had an underwriting rule that mandated that an OPCF-16 must be used when an insured auto is to be laid up for a minimum for 45 consecutive days and when there is no other automobile registered to the named insured or their spouse for which third party and Accident Benefit coverage can be provided. When this information became available to counsel for Royal, he sought similar information from Co-op as to whether they had similar underwriting rules.

Co-op provided the following information in response to the previous Arbitrator's direction:

> "in 2015, Co-operators had underwriting directives regarding removing road coverages and the OPCF-16, for clients with more than one vehicle insured and clients with only one vehicle insured with the company. In Ether case, using the OPCF-16 was not mandatory where a client wanted to remove road coverage in 2015."

Royal's positon on this motion for production is that that information is not sufficient. Royal takes the position that the actual underwriting rule/directive is to be produced and that it is relevant to the issue that will ultimately be before me in this Arbitration.

Therefore, the issue for my determination is:

> "Is Co-operators required to produce their underwriting directive/rule regarding the removal of road coverage and the OPCF-16 in effect when the change in coverage was requested by DJ on November 10, 2015".

As a secondary issue if I find that the documents are producible Co-op takes the position that they are privileged and/or confidential with a proprietary interest and should not be produced on those grounds. On the secondary issue, Royal's position is that there is no privilege and that any confidential nature of those documents can be dealt with by the Order and circumstances in which the underwriting rules would be produced and any subsequent dissemination of that information.

Documents Filed for the Motion:

Both parties filed extensive written material in support of their respective position on these issues. I also received some documents including an email chain between counsel and the previous Arbitrator, some correspondence from the previous Arbitrator and an Affidavit from a representative from Co-op on the issue of the confidential and/or the proprietary nature of the documents being sought. There was also Books of Authority submitted and counsel had an opportunity to make some oral submissions on February 2.

Submissions of the Parties:

Royal's position is that the production of the actual underwriting rule/directive is relevant to the issues before me in the hearing. Royal submits that the test to determine relevancy is either "a semblance of relevancy" or "sufficiently relevant". Royal relies on the decision of Arbitrator Samis in *Royal and Sun Alliance and Wawanesa Mutual Insurance Company 2012 ONCA 17896* and the decision of *Economical Mutual Insurance Company and Wawanesa Mutual Insurance Company 2019 ONCA 9541*.

Royal argues that it is relevant on any of the arguments that will be put before me with respect to the OPCF-16 as to whether or not Co-op followed their own directive in regards to the use of the OPCF-16 as of November 2015. Without an opportunity of reviewing the actual directive itself, Royal submits that it does not have an opportunity to canvass what Co-op should have done in the context of dealings with DJ. Royal submits that while the underwriting rule may not be logically connected to the legal issue of whether or not Ontario automobile insurers were obliged to utilize the OPCF-16 as of November 2015, they submit it is logically connected to proof of the allegations being advanced by Co-op with respect to the contractual arrangements they entered into with DJ when his road coverage was reduced.

Royal also submits again relying on Arbitrator Samis' decision in Royal and Wawanesa (supra), that an insurer's file materials are not immune from production. Royal points out that Orders have been made for production of internal file notes, claims transactions, memorandum, notes

of telephone conversations and recordings of thoughts and events in the contexts of priority disputes and that the underwriting rule/directive of Co-op falls within those categories.

Royal also points to Arbitrator Novick's decision in Economical and Wawanesa (supra) where she concluded that underwriting records from Wawanesa were relevant. She held that "Justice can only be seen to be done once disclosure is made". Accordingly, Royal argues that if there is a semblance of relevance the documents should be produced as if it is potentially relevant the Applicant should have an opportunity to review it and make that determination. Royal submits that insurers are required to follow their own underwriting rules/directives and their failure to do so may invalidate the change in coverage particularly where it could have an adverse effect on the consumer/insured. Therefore, the documents are relevant in terms of production and a determination of their relevance at an Arbitration would come later.

With respect to privilege, Royal takes the position that the underwriting rule/directive is not a privileged document. Royal submits that it may be a confidential document but that does not mean that it is not producible in the context of this priority dispute. Royal did submit that if Co-op was concerned about the proprietary nature of the document the nature of the disclosure could be limited. Royal relies on the Supreme Court of Canada decision *M. (A.) v. Ryan (1997) 1 S.C.R. 157* where the court stated as follows:

> "disclosure of a limited number of documents, edited by the court to remove non-essential material, and the imposition of condition on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship while guarding against the injustice of cloaking the truth"

Royal submits that if I accept that the documents being sought do have some proprietary nature or are confidential that an Order can be made limiting the use and dissemination of those documents to this proceeding.

Co-op submits that there is no relevance to the underwriting directives and that they should not be produced.

Co-op indicates that for the purpose of this Arbitration they have already made the following admissions:

a) It did not offer or explain the OPCF-16 to DJ when he called to remove his road coverage from the policy
b) There was no OPCF-16 placed on his policy when the changes were made to his policy
c) The agent who took DJ's call about removing his coverage had the authority to bind the company including any acts or omissions made with respect to the policy.

During oral submissions, Co-op indicated it was prepared to add to its Agreed Facts that its underwriting directives did not require the agent to use an OPCF-16 when a client wanted to remove road coverage in 2015. This latter, Co-op submits is consistent with the information they provided as to what their underwriting directives state with regard to the OPCF-16.

Co-op submits that the issue before me will be whether or not auto insurers in Ontario were legally obliged to use an OPCF-16 form in November of 2015. If I determine that there was no legal requirement to do so then the next issue would be whether DJ and Co-op entered into a new contract in November of 2015 to remove road coverage. In regards to the latter, Co-op submits that the Arbitrator would then look at the circumstances surrounding the transaction including the following:

1. Was the OPCF-16 offered and explained to DJ
2. Was there a valid agreement: offer acceptance and consideration between DJ and Co-op to remove the coverage from his policy
3. What were the premium changes and did DJ get what he asked for/bargained for.

Co-op submits that in regards to the latter I will be asked to make some findings of fact. I will be asked whether DJ requested the road coverage to be removed and whether Co-op accepted that request. I will be asked whether there was consideration for the transaction and Co-op submits that if all those requirements were satisfied then there was a valid agreement to remove the road coverage from the policy.

Co-op submits that it has already produced the Co-op underwriting file and other documents with respect to DJ's policy. A telephone recording between DJ and Co-op with respect to this transaction in November of 2015 has been produced. In addition, Co-op will call DJ to give evidence and there is also an Agreed Statement of Facts with some of the admissions that have been noted above.

Co-op submits that the production of the underwriting directive will in no way assist the Arbitrator with respect to making a decision on the issues outlined above. Co-op submits there is no relevancy as to what the underwriting directives were and whether or not the agent followed them. All that is relevant (and Co-op may not even agree that this is relevant) that the underwriting directive did not require the Co-op's agent to offer an OPCF-16. Relevant or not, that is an agreed fact.

As to the test that should be applying in determining relevance, Co-op takes the position that there is a difference between the "semblance of relevancy" test versus the "sufficiently relevant" test. Co-op submits that the proper test is that a document is relevant if it is logically connected to and tends to prove or disprove a matter in issue (*Sycor Technology Inc. v Kiaer, 2012 ONSC 5285*).

Co-op submits that relevance is key for the admissibility of evidence in a proceeding and if the evidence is not logically probative of the fact requiring proof (the fact in issue) then it is not admissible. To be probative the evidence must increase or decrease the probability of the truth of a fact (*Ontario v Rothman Inc. 2011 ONSC 2504*).

Co-op's position is therefore that whatever additional information may be in the underwriting directive over and above what Co-op have already provided simply does not move a determination of the key issue forward. It is a question of law as to whether all insurers in Ontario were obliged in November of 2015 to provide an OPCF-16 to remove road coverage. Either it was mandatory or it was not mandatory at law and the underwriting directives of one company cannot be relevant to answer this question.

Finally, Co-op submits on the issue of relevancy that underwriting directive would have no bearing on what contract DJ and Co-op entered into in November of 2015. Either there was an offer acceptance and agreement to take road coverage off the vehicle or there was not. Any underwriting directives that the agent may or may have not been bound by were irrelevant to whether or not there was an agreed upon contractual change.

On the issue of privilege it is Co-op's submission that Co-op is permitted to claim privilege over the confidential documents because it meets the Wigmore privilege test set out by the Supreme Court of Canada in *R v Gruenke [1991] 3 SCR 263* at page 284. Co-op submits that their documents meet this test as it meets the three requirements:

1. The communication originated in confidence
2. The confidence must be essential to the relationship in which the communication arose
3. The relationship must be one which should be sedulously fostered in the public good

I do not propose to go further with respect to the extensive submissions of Co-op on the issue of privilege and/or confidence as I am satisfied that the underwriting rule/directive is not relevant to the issues before me, therefore, it is unnecessary to make a ruling on the issue of privilege/confidentiality.

Analysis and Reasons:

The parties agree that I have jurisdiction to make the Order requested by Royal. This is supported by Section 18(1) and Section 25(6) (b) of the *Arbitration Act*.

I agree with both Arbitrator Samis and Arbitrator Novick that any documents that are potentially relevant in a priority dispute should be produced unless there is good reason not to do so. Arbitrator Samis in the Royal and Wawanesa case (supra) set out that when considering production the Arbitrator must look at the following:

1. The nature of the request for production

2. The context of the dispute
3. The possibility the documents sought will be relevant to the issues or will lead to evidence relevant to the issues between the parties.

Arbitrator Novick agree with the those criteria and I agree with them.

Royal requested a determination from Co-op as to whether they had a rule/directive similar to the Royal that mandated that an OPCF-16 must be used in certain circumstances. Co-op responded to that request and confirmed that they did not have such a rule/directive and that their underwriting directive did not require an OPCF-16 be used. I agree with the previous Arbitrator that, that information was relevant.

The question is whether any other information from the underwriting directive has any relevance to the case before me. The request for production, in my view, goes beyond what is needed to have all the facts before me or available to counsel to properly address the issues in dispute. I agree with Co-op that the underwriting rule/directive has no bearing on whether there was an obligation, in law, for Co-op and/or other insurers for that matter to provide an OPCF-16 to an insured in November of 2015 who was asking to have road coverage removed from his policy. Co-op has confirmed that their underwriting directives did not require that. The question now remains is irrespective of their underwriting directive whether Co-op was obliged at law to provide the OPCF-16. I simply do not see what relevance the underwriting directive has in exploring that issue.

The same is true with respect to the second part of the issue that may ultimately be before me: In determining what went on between Co-op and DJ in November of 2015 and whether there was an agreement made to take road coverage off the vehicle. I simply do not see how the underwriting directive has any bearing on that. It will be an agreed fact that Co-op did not have rule that required them to offer the OPCF-16. Whatever other rules or directives they may have had will have no bearing on what agreement DJ and Co-op entered into, if any, in November of 2015. Relevant information with respect to that would be DJ's evidence as to what he asked for, what he understood about what was available, what Co-op advised him and whether he got the agreement he expected.

The focus of this dispute is on the OPCF-16 as I have outlined above and I agree with Co-op's submissions that what rules Co-op did or did not have in addition to what has already been agreed upon is not relevant to the issues before me.

I do note that the documents that are being requested are not the underwriting file relating to DJ. The underwriting file and relevant policy documents have already been produced. What is being asked to be produced is part of a manual that is created by Co-op with specific underwriting rules and directives. According to the Affidavit of Joanne Dalziel that was produced as part of the argument relating to privilege this document is exclusive to Co-op. The document is, according to their code of ethics, not to be distributed to anyone outside of the company with the exception

FSRA for auto ratings and filings. This manual has nothing to do with DJ's policy. Any information about DJ's policy will be contained in the underwriting file that has already been produced.

Accordingly, I find that the documents requested by Royal are not relevant to the issues in dispute before me and are not producible.

Costs:

Counsel asked me to make an Order with respect to the costs of this motion. However, this request was complicated by the fact that this issue has been going on before a previous Arbitrator. I am not privy at this time to all of the time, submissions and activities that went on before the prior Arbitrator relating to this production motion.

In light of Co-op's success on this motion I am going to Award costs of the motion to Co-op. However that Order is limited to legal costs incurred by Co-op in preparing this motion only since my appointment. Royal will also pay any Arbitrator's costs relating to this motion.

If counsel are unable to workout any agreement with respect to costs relating to similar motions or pre-hearings on this issue before the prior Adjudicator then we can arrange to have that matter heard by way of a costs hearing with appropriate submissions. The same is true if counsel cannot agree on the quantum of costs arising out of my Order.

We have an Arbitration scheduled in this matter to proceed on April 16, 2021. If counsel want to address the issue of costs predating my appointment as Arbitrator at that hearing, they can advise me and we can work out a schedule for submissions

DATED THIS 5th day of February 2021 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP