IN THE MATTER OF s. 275 of the *Insurance Act*, R.S.O. 1990, c.I. 8;

AND IN THE MATTER OF s. 9 of Ontario Regulation 664/90, as amended, made pursuant to the *Insurance Act*;

AND IN THE MATTER OF the *Arbitration Act*, 1991, S.O. 1991, c. 17;

AND IN THE MATTER OF an Arbitration

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and

UNIFUND ASSURANCE COMPANY

Respondent

PRELIMINARY RULING

I. INTRODUCTION

A Pre-Hearing in this case was held before me on May 25, 1999. The Applicant, Jevco Insurance Company ("Jevco") was represented by Mr. Chris Blom. The Respondent, Unifund Assurance Company ("Unifund") was represented by Mr. Gerald S. George.

The Arbitration is being held pursuant to Section 275 of the *Insurance Act*. At the Pre-Hearing, as confirmed in my letter to both counsel dated May 27, 1999, the parties agreed that the following are the substantive issues to be determined at the Arbitration:

(1) Is Unifund responsible, pursuant to the Loss Transfer Provisions under the *Insurance Act* and its Regulations, to repay Jevco for the "legal expenses" component ($75,000.00) of the settlement reached with the insured, Brian Remple, at a Mediation facilitated by Bruce Robinson on June 3, 1998 (hereinafter referred to as the "Mediation")?

(2) Is Unifund obligated to pay Jevco the sum of $5,136.45 in accordance with the Loss Transfer Provisions under the *Insurance Act* and its Regulations for the Loss Transfer Request dated and delivered on October 26, 1998?

(3) The interest, if any, to be paid by Unifund to Jevco.

(4) The costs of this Arbitration.

At the Pre-Hearing, a tentative Hearing date was scheduled for August 25, 1999, commencing at 10:00 a.m. at the office of Viva Voce Verbatim Inc. Counsel for Jevco advised that he wishes to call evidence from E. Lynne Carson, who was the in-house lawyer present on behalf of Jevco at the Mediation, to give evidence as to what transpired at the Mediation. Counsel for Jevco also indicated that he may call counsel for the insured, Brian Remple, to give evidence as to what transpired at the Mediation.

Counsel for Unifund objected to any evidence being adduced from Ms. Carson or counsel for Mr. Remple as to what transpired at the Mediation. Counsel for Unifund does not object to Ms. Carson or counsel for Mr. Remple giving evidence as long as that evidence does not include evidence as to what transpired at the Mediation.

Accordingly, I was asked to rule on the compellability of Ms. Carson and counsel for Mr. Remple to give evidence as to what transpired at the Mediation. Written Submissions were filed with me by Mr. George. Thereafter, Mr. Blom filed his Written Submissions with me. Mr. George then filed Reply Submissions on behalf of Unifund.

It is important to note that in the concluding comments contained in the Submissions filed on behalf of Jevco, counsel for Jevco reiterates his request that Jevco be permitted to call the evidence of E. Lynne Carson respecting all communications prior to, in the course of, and subsequent to the Mediation as the evidence relates to the alleged agreement to pay the sum of $75,000.00 towards the costs of Mr. Remple. The concluding comments go on to say that "Jevco does not seek to call the Mediator to give evidence in the course of this Arbitration. Jevco does not seek to call the evidence of any other party or counsel who appeared at the Mediation." Accordingly, the only issue to be decided by me is whether E. Lynne Carson is a compellable witness to give evidence as to what transpired at the Mediation.

II. UNIFUND'S SUBMISSIONS

Unifund's Submissions are set out in detail in the Written Submissions and Reply Submissions filed by counsel for Unifund. The essence of Unifund's Submissions can be summarized as follows:

(1) Section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S. 22 (hereinafter referred to as the "SPPA") provides that although an Arbitrator may admit as evidence at a Hearing any oral testimony or document which is relevant whether or not the testimony or document would be admissible as evidence in a Court, Section 15(2) of the SPPA provides that nothing is admissible in evidence at a Hearing that would

be inadmissible in a Court by reason of any privilege under the law of evidence.

(2) Section 30 of the *Arbitration Act, 1991*, provides that "no person shall be compelled to produce information, property or documents or to give evidence in an Arbitration that the person could not be compelled to give in a Court proceeding."

(3) Although the Mediator, the parties and the lawyers present at the Mediation are competent witnesses, for the same reasons that an Arbitrator is not a compellable witness, the parties to a Mediation and their lawyers are not compellable witnesses with respect to what transpired at the Mediation.

(4) Even if the parties and their lawyers are compellable witnesses, the subject matter of the Mediation is privileged on the basis of:

(a) the "Wigmore test"; or

(b) as settlement or "without prejudice communications".

III. JEVCO'S SUBMISSIONS

Jevco's Submissions are set out in detail in the Written Submissions filed by counsel for Jevco. The essence of Jevco's Submissions can be summarized as follows:

(1) In order to resolve the issues in this Arbitration, the Arbitrator is required to hear evidence with respect to the discussions, or lack of discussions, that took place at the Mediation between the representative

of Jevco and the representative of Unifund respecting the issue of the payment of the sum of $75,000.00 towards the costs of Mr. Remple in the settlement of his accident benefits claim.

(2) Jevco was not a party to the Mediation. Accordingly, Jevco is not bound by the terms and conditions of the Mediation Agreement.

(3) The matter in dispute in the course of the Mediation involved the claims on behalf of Mr. Remple in his tort action and with respect to his accident benefits claim. Counsel for Jevco argues that that dispute is to be distinguished from the matter in dispute relating to the loss transfer claim as between Jevco and Unifund.

(4) The "Wigmore test" is not applicable to the facts in this case. Accordingly, it is submitted that there is no privilege in this case as a result of the "Wigmore test".

(5) The "without prejudice communications" test is also inapplicable to the facts in the present case.

IV. ANALYSIS

1. Evidence at an Arbitration

Section 21 of the *Arbitration Act*, 1991, S.O. 1991, c.17, provides as follows:

> "21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications."

Section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S. 22, provides as follows:

> "15. - (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) that is inadmissible by the statute under which the proceeding arises or any other statute."

Section 30 of the *Arbitration Act* provides as follows:

> "30. No person shall be compelled to produce information, property or documents or to give evidence in an arbitration that the person could not be compelled to produce or give in a court proceeding."

Accordingly, although evidence admissible at an Arbitration is wider in scope than evidence that might be admissible in a Court, by virtue of Section 15 of the SPPA and Section 30 of the *Arbitration Act*, nothing is admissible at an Arbitration that would be inadmissible in a Court by reason of any privilege under the law of evidence and no person shall be compelled to produce information, property or documents or to give evidence in an

Arbitration that the person could not be compelled to produce or give in a Court proceeding.

2. The Compellability of the Mediator

As a general rule, every person is a competent witness and every competent witness is compellable. As noted above, Jevco does not seek to call the Mediator who conducted the Mediation to give evidence at the Arbitration. Accordingly, it is not necessary for me to decide whether the Mediator is a compellable witness to give evidence as to what transpired at the Mediation. Had it been necessary for me to make this decision, I would have decided that the Mediator is not a compellable witness to give evidence as to what transpired at the Mediation. [See *Re Clendenning and Board of Police Commissioners for City of Belleville* (1976), 15 O.R. (2d) 97 (C.A.), *MacKeigan v. Hickman* (1989), 61 D.L.R. (4th) 688 (S.C.C.), *Agnew v. Ontario Assn. of Architects* (1987), 64 O.R. (2d) 8, [1988] O.J. No. 1181 (Div. Ct.)]

While I appreciate that the above-noted cases all deal with the compellability of Judges or members of an Arbitral Tribunal to give evidence, in my opinion, the same principle should apply to the compellability of a Mediator to give evidence concerning the subject matter or process of a Mediation facilitated by him or her.

Support for this conclusion can be found in various codes of conduct which apply to Mediators. (See for example Sections 24 and 25 of the Rules of Procedure for the Conduct of Mediations of the Arbitration and Mediation Institute of Ontario Inc. and the CBAO Code of Conduct which has been adapted in its entirety to all Mediations under the Mandatory Mediation Program.)

3. The Compellability of E. Lynne Carson

Despite the submission by counsel for Unifund that the parties and their lawyers are not compellable witnesses with respect to what took place at the Mediation, no authority was provided to me in support of this proposition and I am of the view that the parties and their lawyers are compellable witnesses subject to any privilege which may apply in the circumstances.

Counsel for Unifund argues that even if the lawyers are found to be compellable witnesses, the subject matter of the Mediation is privileged and therefore inadmissible evidence. It was submitted that the subject matter of the Mediation was privileged on the basis of either:

(1) the "Wigmore test"; or

(2) "without prejudice communications".

In determining whether the discussions at the Mediation are privileged, it is important to keep in mind the following:

(1) At the Mediation, Unifund was present in its capacity as the insurer of the tortfeasor;

(2) Jevco was the "first party insurer", namely the insurer responsible under Section 268(2) of the *Insurance Act* for the payment of statutory accident benefits to Mr. Remple. Unifund was the "second party insurer", namely the insurer required under Section 275 of the *Insurance Act* to indemnify Jevco;

(3) The accident happened on July 13, 1995, under the Bill 164 Regime. Under Bill 164, the settlement of Mr. Remple's claim for statutory accident benefits is totally separate and distinct from the settlement of Mr. Remple's claim for damages in tort. The Mediation of Mr. Remple's claim for statutory accident benefits took place at the same time as the Mediation of Mr. Remple's tort claim although there was no requirement that the two Mediations be held together;

(4) I find as a fact that Jevco was a party to the Mediation notwithstanding that the Mediation Agreement was not signed on behalf of Jevco.

A. Privilege - the "Wigmore test"

In *Slavutych v. Baker et al.* (1975), 55 D.L.R. (3d) 224 and in *R. v. Gruenke*, [1991] 3 S.C.R. 263, the Supreme Court of Canada considered whether communications would be privileged (and therefore inadmissible) under the "Wigmore test". The Court set out the test as follows (Wigmore, Evidence in Trials at Common Law, vol. 8, McNaughton Revision, para. 2285):

> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." [Emphasis in original.]

At page 286 of the *Gruenke* case, Lamer J. states:

> "... The term 'case-by-case' privilege is used to refer to communications for which there is a *prima facie* assumption that they are <u>not</u> privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case."

Having regard to the four criteria in the "Wigmore test" and the facts in this case, I am of the opinion that all four criteria of the "Wigmore test" are met. The communications clearly originate in a confidence that they will not be disclosed. This element of confidentiality is essential to the full and satisfactory maintenance of the relations between the parties. With respect to the third criterion, in my view, it is very important to the community that parties be encouraged to resolve their disputes without resort to the Courts. With respect to the fourth criterion, I agree with the statement made by the Court in *Porter v. Porter* (1983), 40 O.R. (2d) 417 (U.F.C.), at page 421:

> "While the competing interests related to public policy are plain, it is, in my view, of far greater importance that parties, with the aid of a mediator, are able to engage in frank and open discussion that can lead to agreed upon arrangements in the interests of children than that some information may be lost to a court in a subsequent proceeding."

Accordingly, as all four of Wigmore's criteria are satisfied by the facts in the present case, E. Lynne Carson's evidence as to what transpired at the Mediation is privileged and not admissible.

B. Privilege - Without Prejudice Communications

Courts have recognized that communications made with a view to settlement may be privileged. In their text on evidence, Sopinka, Lederman and Bryant set out a number of conditions that must be present for the privilege to be recognized:

(a) a litigious dispute must be in existence or within contemplation;

(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

(c) the purpose of the communication must be to attempt to effect a settlement.

(See Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at p. 722.)

When applying these conditions to the facts of the present case, it is clear that there was a litigious dispute in existence between Mr. Remple and the tortfeasor. In addition, there was a litigious dispute contemplated between Jevco and Unifund. The communications that took place during the course of the Mediation were made with the express or implied intention that they would not be disclosed in the event the negotiations failed. It is also clear that the purpose of the communications was to attempt to effect a settlement.

Accordingly, in my view, the evidence of E. Lynne Carson as to what transpired at the Mediation is inadmissible as it is privileged as being without prejudice communications. In coming to this conclusion, I am unable to agree with the distinction that counsel for Jevco wishes me to make between the dispute involving the claims made by Mr. Remple for statutory accident benefits and for damages in his tort action versus the dispute between

Jevco and Unifund respecting the loss transfer claim for indemnification. In my view, the disputes in question are inextricably intertwined. In this regard, I rely in part upon *I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.*, [1968] 1 O.R. 462 (H.C.J.), affirmed [1968] 2 O.R. 452 (C.A.). This case stands for the proposition that communications made on a without prejudice basis and with a view to settlement between A and B are also privileged in an action brought by C against A.

4. Public Policy Considerations

In arriving at the conclusion that I have that the evidence of E. Lynne Carson respecting what transpired at the Mediation is inadmissible as being privileged, I am also mindful of public policy considerations. The proper functioning of the Administration of Justice in Ontario relies upon a majority of cases being settled prior to reaching Trial. Many of these cases are now being settled through Mediation with the assistance of a neutral Mediator. Obviously, the value of Mediation has been recognized by the Government's implementation of a Mandatory Mediation Program. The Mediation process should be promoted and appropriately supported. Parties to litigation might not make efforts to settle if the parties are unable to rely upon the confidentiality of the settlement discussions.

In *887574 Ontario Inc. v. Pizza Pizza*, [1994] O.J. No. 3112, the Court considered whether to seal an Appeal Record which contained details of arbitral proceedings. At page 3 of the Decision, the Court stated:

> "I think it fair to observe that a binding arbitration is a non-court equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties. This differs from other forms of ADR in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, non-binding opinion, non-binding arbitration. Of

> course, the simplest method - often overlooked - is that of non-involvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately; more to the point, I suspect it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concession giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to Trial. If this were doubled to several percent the system would collapse. Therefore, in my view public policy supports the non-trial resolution of disputes. ...
>
> ... I believe that it is obvious that if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course is subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure. ..."

In the *I. Waxman & Sons Ltd.* case referred to above, at page 656, the Court stated:

> "In my opinion, the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application."

Section 275 of the *Insurance Act* is the Section that deals with loss transfer payments. Section 275(5) provides as follows:

> "275(5) No arbitration hearing shall be held with respect to indemnification under this Section if there is an unsettled claim against any of the insurers by an insured in respect of the incident for which indemnification is sought."

Accordingly, the *Insurance Act* requires that the Arbitration regarding a loss transfer request be held after all claims for statutory accident benefits have been settled between the "first party insurer" and the insured. In my view, I must keep this in mind because as noted above the settlement of the insured's claim for statutory accident benefits often takes place without the second party insurer present or involved in any way. A "first party insurer" and its insured must be able to enter into settlement discussions without the fear of having those discussions scrutinized by the "second party insurer". In this case, Unifund was present at, and participated in, the Mediation of the insured's claim for statutory accident benefits and Jevco wishes to adduce evidence as to what transpired at the Mediation. For all of the reasons set out above, this evidence is inadmissible.

V. ORDER

Jevco may call E. Lynne Carson as a witness but Ms. Carson shall not testify as to what transpired at the Mediation that took place on June 3, 1998.

July 29, 1999

J. Jay Rudolph, Arbitrator