



FSCO A07-002593

**BETWEEN:**

**JAMES BOROWSKI**

**Applicant**

**and**

**AVIVA CANADA INC.**

**Insurer**

**DECISION ON A MOTION**

**Before:** Jeffrey Rogers  
**Heard:** July 29, 2008, in Guelph, Ontario  
**Appearances:** Douglas P. O'Toole, solicitor for Mr. Borowski  
Robert H. Rogers, solicitor for Aviva Canada Inc.

**Issues:**

The Applicant moves for an order excluding the expert reports Aviva Canada Inc. ("Aviva") obtained from Brigham & Associates Inc. from the arbitration hearing and, in the alternative, an order requiring Aviva to fund replies to these reports.

The issues are:

1. Are the reports Aviva obtained from Brigham & Associates Inc. admissible at the arbitration hearing regarding Mr. Borowski's entitlement to a catastrophic designation?
2. If the reports are admissible, does Aviva have an obligation to fund replies to these reports under section 24 or 42 of the *Schedule*?<sup>1</sup>

---

<sup>1</sup>*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

**Result:**

1. The reports Aviva obtained from Brigham & Associates Inc. are admissible at the arbitration hearing.
2. Aviva does not have an obligation to fund replies to these reports under section 24 or 42 of the *Schedule*.

**SCOPE OF MOTION:**

Mr. Borowski sought a ruling precluding Aviva from submitting that it is premature to decide whether to exclude the subject reports on the grounds that they are of little probative value.

Mr. Borowski argued that Aviva was estopped from taking this position because Aviva agreed that admissibility of the reports would be determined in advance of the hearing.

Aviva submitted that its objection was properly made because, when it agreed that the issue would be determined by way of a pre-hearing motion, the only position that Mr. Borowski had taken was that the reports should be excluded since they were obtained in breach of section 42 of the *Schedule*.

I ruled that Aviva's agreement was not a concession that every argument that Mr. Borowski chose to raise on admissibility of the reports was properly the subject of this motion. I also informed the parties that the issue was largely moot, because Aviva's concern that a pre-hearing determination of probative value would usurp the role of the hearing Arbitrator was resolved by the fact that I will be presiding at the hearing as well as the motion.

**FACTS:**

The facts are not in dispute. Mr. Borowski was injured in a motor vehicle accident on October 24, 2001. He applied for and received statutory accident benefits from Aviva, payable under the *Schedule*. The parties disagree on his entitlement to certain further benefits and on whether Mr. Borowski sustained a catastrophic impairment as a result of the accident.

In January 2007 Mr. Borowski submitted an Application for Determination of Catastrophic Impairment, supported by a report authored by Dr. Ronald Kaplan. Pursuant to section 42 of the *Schedule*, Aviva gave Mr. Borowski notice in March 2007 that it required him to attend medical examinations regarding this issue. Mr. Borowski attended the examinations deemed necessary by the three-person medical team Aviva chose. The team delivered its reports in August 2007 and, based on these reports, Aviva determined that Mr. Borowski did not sustain a catastrophic impairment as a result of the accident. Mr. Borowski obtained rebuttal reports, authored by a three-person team of his choice, pursuant to section 42.1 of the *Schedule*.

Mr. Borowski applied for mediation and, after mediation failed to resolve the dispute, he applied for arbitration. A pre-hearing was held on April 29, 2008. Aviva served Mr. Borowski with the three reports at issue in this motion on May 4, 2008. They were authored by three doctors from the United States who conduct business under the name of Brigham & Associates. Counsel for Aviva retained Brigham & Associates to conduct a "paper review" of the material in Aviva's possession and give their opinion on whether Mr. Borowski had sustained a catastrophic impairment. Aviva provided Brigham & Associates with copies of Mr. Borowski's medical records it had received and copies of the reports of its doctors and Mr. Borowski's doctors. Aviva did not seek Mr. Borowski's consent. Brigham & Associates concluded that Mr. Borowski did not sustain a catastrophic impairment as a result of the accident.

#### **PARTIES' POSITIONS:**

Mr. Borowski's position is that the reports from Brigham & Associates should be excluded because his contract with Aviva and the *Schedule* provide a complete code of Aviva's rights of access to his medical records and its use of those records. He argues that, since neither his contract nor the *Schedule* specifically provides that Aviva may disclose his medical records except in the context of an examination under section 42 of the *Schedule*, Aviva is precluded from disclosing those records, except for the purpose of a section 42 examination. Aviva therefore obtained the reports from Brigham & Associates by breaching his right to privacy.

Mr. Borowski further submits that the reports should be excluded because Aviva breached the provisions of the *Personal Information Protection and Electronic Documents Act, 2000*<sup>2</sup> (the *PIPED Act*) and its own Privacy Policy by sending his medical records to Brigham & Associates. He also submits that the reports should be excluded because the authors usurp the function of the Arbitrator by offering their opinion on the interpretation of the relevant legislation, criticizing the judicial approach to the legislation and impugning Mr. Borowski's credibility. Finally, Mr. Borowski submits that the reports should be excluded because they are of little probative value.

Aviva submits that, although its contract with Mr. Borowski and the *Schedule* provide a complete code of the parties' substantive rights, neither addresses the scope of procedural rights in the context of adversarial proceedings. It concedes that the subject reports were not obtained pursuant to section 42 of the *Schedule*, but argues that it is permitted to obtain them, unless specifically prohibited by statute or legal principle. Its position is that, because Mr. Borowski's medical condition is at issue in the arbitration, there is a diminished expectation of privacy regarding his relevant medical records. It therefore did not breach his right to privacy in providing his records to Brigham & Associates. It argues that, even if it did breach Mr. Borowski's rights in obtaining the reports, the breach was minor and the jurisprudence does not support exclusion of the reports in those circumstances.

Aviva denies that it breached the *PIPED Act* or its Privacy Policy and submits that, although the Brigham & Associates' venture into statutory interpretation might mean that some sections of the reports would be excluded or given no weight, that does not lead to exclusion of the reports in their entirety.

#### **COMPLETE CODE OF RIGHTS:**

As noted above, Mr. Borowski's position is that his contract with Aviva and the *Schedule* circumscribe the information he is required to provide to Aviva, the purposes for which Aviva may use the information and the persons to whom Aviva may disclose it. He argued that he only provided Aviva with his medical records because he was required to do so for the purpose of the

---

<sup>2</sup>S.C. 2000, c.5

examination permitted by section 42 of the *Schedule*, therefore Aviva was only permitted to use them for that purpose.

Section 33(1.1) of the *Schedule* imposes a general obligation on insured persons to provide insurers with “[A]ny information reasonably required to assist the insurer in determining the person’s entitlement to a benefit.” In addition, Rule 32 of the *Dispute Resolution Practice Code* (the “*Code*”) imposes the requirement for “prompt and complete exchange of documents that are reasonably necessary to determine the issues being arbitrated”. It is therefore not accurate to say that Mr. Borowski disclosed his medical records only because Aviva had the right to have him examined pursuant to section 42. Mr. Borowski was required to provide that information in any event. Neither the *Schedule* nor the *Code* prescribes limits on the insurer’s use of the information it receives.

Section 42 of the *Schedule* does not address information to be provided to an insurer. Section 42(10)(a) addresses information to be provided to “the person or persons conducting the examination” where an insured person is required to attend an examination under section 42. Section 42(10)(a) places an obligation on both the insured person and the insurer to “provide to the person or persons conducting the examination all reasonably available information and documents that are relevant or necessary for the review of the insured person’s medical condition”. That means that the insurer is required to provide to the person conducting the examination any relevant information it has received from the insured person and any other relevant information in its possession. The insured person also has a similar obligation to provide information directly to the person conducting the examination.

The thrust of section 42(10)(a) is to ensure that examinations of insured persons are conducted with all relevant knowledge. In providing for the insured person to provide information directly to the person conducting the examination, it safeguards the interest of an insured person in having the examination conducted on the basis of a complete record. It regulates neither the information to which insurers are entitled, nor the uses that insurers may make of the information they acquire.

Section 42(10)(a) certainly allows insurers to provide information to persons conducting examinations on their behalf. However, that does not mean that this is the only permitted use. To accept Mr. Borowski's position would mean that Aviva would be precluded from filing his medical records as evidence in the very proceeding in which he was required to disclose them, because there is no provision that specifically permits Aviva to do so.

Mr. Borowski relies on the decision of the Court of Appeal in *Haldenby v. Dominion of Canada General Insurance Co.*<sup>3</sup> in support of his position that the *Schedule* contains a complete code of the rights of the parties. In that case the Court held that the insured person had no right to reapply for further income replacement benefits, after the insurer had terminated those benefits, because there was no provision in the *Insurance Act*<sup>4</sup> or the *Schedule* to allow it. The Court noted that the suggested approach would "extend a claimant's entitlement to benefits for an indeterminate period of time"<sup>5</sup> and that it was contrary to the scheme of the *Schedule*. The Court did not rule that the *Schedule* is a complete code of all procedural and substantive rights of the parties. I accept Aviva's submission that this decision reaffirms the trite maxim that the substantive rights of the parties must be found in the *Insurance Act* or the *Schedule*.

If one were required to look to the *Schedule* for every step in the dispute resolution process, it would grind to a screeching halt. For instance, although Mr. Borowski concedes that Aviva had the right to share his medical information with its counsel, the *Schedule* does not confer that right. Similarly, the *Schedule* does not contemplate the standard practice of retaining accountants and providing them with the insured person's financial records, where the quantum of entitlement to income replacement benefits is at issue. The *Schedule* does not contemplate that insurers would retain experts in accident reconstruction, often providing them with the medical records of the insured person, where there is a dispute about whether an accident occurred. The *Schedule* does not permit the common practice of applicants who obtain expert opinions by non-treating doctors, for the sole purpose of presenting them as evidence in the arbitration.

---

<sup>3</sup>[2001] O.J. No. 3317

<sup>4</sup>R.S.O. 1990 c. I.8, as amended.

<sup>5</sup>At paragraph 36

The admissibility of evidence at an arbitration hearing is addressed in Rule 39.3 of the *Code* and section 15 of the *Statutory Powers Procedure Act*.<sup>6</sup> The only limits on the admissibility of relevant evidence found in those provisions are:

- Evidence that would not be admissible in a court by reason of any privilege under the law of evidence;
- Evidence that is not admissible under the *Insurance Act*; or
- Evidence that is not admissible under any other statute.

None of those restrictions applies here.

Aviva is by no means the first Insurer to have obtained an opinion based on a paper review. Arbitrators have commented on the practice in several decisions. The practice has never been censured. In *Hart and Allstate Insurance Company of Canada*<sup>7</sup>, the Arbitrator made the following comment in refusing to find that proposed section 42 examinations were reasonable and necessary:

I have no evidence as to how examinations today will shed greater light on Mrs. Hart's physical or emotional condition four years ago (regarding the partial inability test) or six years ago (regarding causation) than a paper review by experts of Allstate's choice (given the extensive document production over and above the prior DAC assessments), which has been and continues to be an option at the Insurer's disposal.<sup>8</sup>

In *Rushlow and ING Insurance Company of Canada*<sup>9</sup>, the Arbitrator made the following comment in similar circumstances:

---

<sup>6</sup>R.S. O. 1990, c. S. 22

<sup>7</sup>(FSCO A98-000988, July 6, 2001)

<sup>8</sup>*Hart supra*, at paragraph 68

<sup>9</sup>(FSCO A07-000707, June 17, 2008)

If ING desires further input of a neurophysical nature, there is nothing to prevent it from obtaining a "paper" opinion based on the documents and reports...<sup>10</sup>

The theme was revisited in *Wilson and Aviva Canada Inc.*<sup>11</sup> In that decision, the Arbitrator noted as follows:

While the law and the jurisprudence are clear that section 42 of the *Schedule* gives the insurers a right to override such normal privacy concerns, provided that the legal pre-conditions for the examination are met in this matter, I have found that those pre-conditions were not met.

While it may well have been reasonable to perform an unintrusive paper review of Ms. Wilson's condition, based on the extensive material potentially available to the Insurer, this is not what was proposed.<sup>12</sup>

Although the issue of whether an insurer breaches the *Schedule* or the privacy interests of the Insured person in conducting a "paper review" was not raised in the above cases, the endorsement of the practice in these decisions suggests that a breach is not gross, plain and obvious, as Mr. Borowski submitted. The decisions recognize that a paper review is a relatively unintrusive means of obtaining evidence for a hearing.

The principle that a party to an adversarial proceeding is entitled to a diminished expectation of privacy concerning personal information relevant to the dispute is well established. Because Mr. Borowski was required to disclose his medical records to Aviva, the narrow question is whether it was reasonable to expect that Aviva was precluded from disclosing the information it received to its agents. Mr. Borowski concedes that Aviva had the right to disclose the information to counsel. I see no substantive difference between disclosure to counsel and Aviva's disclosure to medical experts for the purpose of obtaining an opinion on the issue in dispute. Aviva's recruitment of professional expertise is at the heart of both relationships.

---

<sup>10</sup>At page 6

<sup>11</sup>(FSCO A07-001278, March 5, 2008)

<sup>12</sup>*Ibid.*, at paragraphs 36 and 37

I find that Aviva did not breach the provisions of the *Schedule* or violate Mr. Borowski's reasonable expectation of privacy in obtaining the reports from Brigham & Associates. This ruling does not mean that there would be no limits on what Aviva can do with the personal information it receives from Mr. Borowski, as he submitted. Aviva has simply provided information to its agent for a purpose related to an ongoing dispute. It is not necessary to speculate on what the limits might be, for the purpose of this decision.

Because the right to obtain the subject reports is not based on section 42 of the *Schedule*, I find that Aviva was not required to comply with the notice provisions of section 42, as Mr. Borowski submitted. For the same reason, Aviva is not required to fund rebuttal reports pursuant to section 42 of the *Schedule*.

#### **VIOLATION OF THE *PIPED* ACT OR PRIVACY POLICY:**

The *PIPED Act* regulates the collection, use and distribution of personal information collected in the course of commercial activity.

Mr. Borowski relies on the decision of the Federal Court of Appeal in *Rousseau v. Canada (Privacy Commissioner)*<sup>13</sup> in support of his position that his medical records were provided to Brigham & Associates, in breach of the provisions of the *PIPED Act*. The applicant in that case was receiving long-term disability benefits from an insurer. Pursuant to its right under the insurance policy, the insurer required the applicant to attend an independent medical examination (IME). The insurer terminated benefits on the basis of the report. The applicant sought production of the complete file of the doctor who had performed the examination. The doctor refused to disclose his handwritten notes. The issue on appeal was whether the handwritten notes of a doctor performing an IME in Ontario, at the request of an insurer, are personal information under the *PIPED Act*. The Court had to determine that issue in the applicant's favour in order to grant the only remedy sought under the *PIPED Act*: the right of the applicant to access to the information.

---

<sup>13</sup>[2008] F.C.J. No. 151

At the appeal, the applicant limited his request to the doctor's notes on the answers he gave to questions asked and the doctor's observations of the applicant's behaviour. The Court ruled that the doctor's notes contained the applicant's personal information to which he has a right of access and remitted that matter to the Privacy Commissioner for a determination of which portions of the notes should be disclosed. The Court noted as follows:

In light of the Privacy Commissioner's recognition that there are in the notes information which is personal to Mr. Rousseau and information which is not, it may be said that in the end, Mr. Rousseau has a right of access to the information he gave to the doctor, and to the final opinion of the doctor in the form of the report to the insurer. In accordance with Principle 4.9.1 of Schedule 1 to the PIPED Act, this enables Mr. Rousseau to correct any mistakes in the information he gave the doctor or which the doctor noted, as well as any mistakes in the doctor's reasoned final opinion about his medical condition. But the process of getting to that final opinion from the initial personal information of Mr. Rousseau belongs to the doctor.<sup>14</sup>

This excerpt highlights the fact that the issue in *Rousseau* was quite different from the issue in this motion. Mr. Rousseau was seeking access to his records, not the exclusion of evidence. The *PIPED Act* provides no such remedy. The Court was not asked to address the question of whether the insurer or the doctor conducting the IME breached the *Act* in the transfer of the medical records.

The Court noted that, before the matter was heard, Mr. Rousseau and the insurer had settled an action he had commenced in the Superior Court. There is no mention of an order excluding the doctor's report from evidence in that action. In *Rousseau*, the focus of the Court was on determining whether the doctor conducting the IME was engaged in "commercial activity", a requirement for the *PIPED Act* to apply, and whether the doctor was in possession of the personal information of Mr. Rousseau.

---

<sup>14</sup>At paragraph 49

In *Ferenczy v. MCI Medical Clinics*<sup>15</sup>, the Ontario Superior Court directly addressed the question of whether a potential breach of the *PIPED Act* should result in the exclusion of evidence obtained as a result of the breach. In that case, the plaintiff in an action for damages for the alleged negligence of a doctor sought an order excluding surveillance evidence on the grounds that it was personal information, collected or recorded in violation of the *PIPED Act*. The Court refused to exclude the evidence, giving the following reasons:

At the outset I wish to point out that the Act does not contain a provision which prohibits the admissibility into evidence of personal information collected or recorded in contravention of the Act. Rather the Act provides that an individual or the Privacy Commissioner may bring a complaint which results in an investigation and report under the Act. Thereafter, certain steps described in the legislation may be taken in the Federal Court. Consequently, if the collection of surveillance evidence in this case is said to be a violation of the Act a complaint may be filed pursuant to the Act to commence that process. However, that has no direct impact on the issue of the admissibility of evidence in this trial.

The evidence at issue here is relevant, in my view, and the probative value of the evidence exceeds its prejudicial effect. By prejudicial effect, I mean the danger that the evidence will be misused. As stated, I have concluded that a proper limiting instruction is adequate in this case to ensure that the evidence is used for the limited purpose for which I propose to admit it.

This is not a case involving state action and consequently no consideration arises as to the applicability of the Canadian Charter of Rights and Freedoms or the exclusion of evidence pursuant to the provisions of the Charter.

Prima facie relevant evidence is admissible, subject to a discretion to exclude where the probative value is outweighed by its prejudicial effect. This is the test in both criminal and civil cases: *R. v. Morris*, [1983] 2 S.C.R. 190, 1 D.L.R. (4th) 385, 48 N.R. 341, 7 C.C.C. (3d) 97; and see *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at pp. 23-38.

There is also a discretion in a trial judge to exclude evidence that would render a trial unfair. In *R. v. Harrer*, [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98, Justice La Forest concluded that this historical concern with trial fairness has now been enshrined in s. 11(d) of the Charter. As I have indicated the Charter is not at issue in this case. However, that does not mean that the common law discretion to exclude evidence, to which Justice La Forest was referring as the underpinning of s. 11(d) of the Charter, does not continue to operate in a non-Charter context.

---

<sup>15</sup>(2004), 70 O.R. (3<sup>rd</sup>) 277

I conclude that the admission of the evidence here in question will not render the trial unfair. The video will be shown to the plaintiff and the jury. The jury will hear any explanation offered by the plaintiff concerning the contents of the video and will determine to what extent, if at all, the surveillance evidence assists them in assessing the complainant's credibility. The plaintiff has sued Dr. Weinstein and made a claim in her pleadings and in her evidence that her left hand has been disabled. The surveillance was undertaken in a public place and relates directly to the alleged disability. The introduction of such evidence has the potential to operate unfavourably to the plaintiff, but not to render the trial unfair.<sup>16</sup>

I adopt the above reasons and approach, the key elements of which are:

- The remedy that the applicant seeks is not provided in the *PIPED Act* and the provisions of the *Act* have no direct bearing on the admissibility of evidence;
- Relevant evidence is *prima facie* admissible, subject to a discretion to exclude where the probative value is outweighed by its prejudicial effect;
- Although the *Charter* has no direct application, it informs the discretion to exclude evidence on the grounds that it would render the trial unfair.

It is not disputed that the reports at issue in this motion are relevant. I have found that Mr. Borowski was not reasonably entitled to privacy regarding the information used to prepare the reports. I find that the admission of the reports will not render the arbitration hearing unfair. Relevant evidence will always have the potential to influence an unfavourable result, but that does not render the hearing unfair. I see no merit in Mr. Borowski's submission that allowing insurers to tender reports based on paper reviews would give them a licence to bludgeon insured persons into submission with numerous reports, because of the disparity in resources. That submission is undercut by the fact that the assessment of expert evidence is not influenced by the number of experts offering the opinion and opinions based on paper reviews are often discounted because the person conducting a paper review did not interview and assess the subject in person. Mr. Borowski's position is also undercut by his own submission that the subject reports are of little probative value.

---

<sup>16</sup>At paragraphs 15 to 20

BOROWSKI and AVIVA  
FSCO A07-002593CM  
9/16

As the Court noted in *Ferenczy*, the above findings are sufficient to dispose of the issue of admissibility. However, the Court went on to find that there was no breach of the *PIPED Act* in these circumstances. The Court gave extensive reasons for that conclusion. The following excerpt is relevant to the circumstances of this case:

One way to avoid this result, and I conclude it is the correct interpretation of the Act, is to apply the principles of agency. On this analysis it is the defendant in the civil case who is the person collecting the information for his personal use to defend against the allegations brought by the plaintiff. Those whom he employs, or who are employed on his behalf, are merely his agents. On this analysis s. 4(2)(b) of the Act governs. That section reads as follows:

4(2) This Part does not apply to

...

(b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose.

The defendant through his representatives was employing and paying an investigator, to collect information for him. It is the defendant's purpose and intended use of the information that one should have regard to in determining the applicability of the Act. On the basis of this analysis I conclude that the defendant is not collecting or recording personal information in the course of commercial activity. He, through his agents, was collecting information to defend himself against the lawsuit brought by the plaintiff. This is a personal purpose in the context of the civil action brought against him by the plaintiff. In my view, this conclusion is consistent with the overall purpose of the Act which is aimed primarily at information collected as a part of commerce. Section 3 of the Act reads as follows:

*Purpose*

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Attention:  
Donna  
1-905-525-7897

Closely related to this reasoning is my further conclusion, that in the circumstances here (where the recording was in a public place), the plaintiff has given implied consent to the defendant to collect, record and use her personal information insofar as it is related to defending himself against her lawsuit. A plaintiff must know that by commencing action against a defendant, rights and obligations will be accorded to the parties to both prosecute and defend. The complainant has effectively, by commencing this action and through her pleadings, put the degree of injury to her hand and its effect on her life into issue. One who takes such a step surely cannot be heard to say that they do not consent to the gathering of information as to the nature and extent of their injury or the veracity of their claim by the person they have chosen to sue. Consent is not a defined term under the Act, and there is no indication in the Act that consent cannot be implied.<sup>17</sup>

I endorse and adopt the above approach. I find that Aviva retained Brigham & Associates as its agents, for the personal purpose of responding to Mr. Borowski's application, triggering the exemption in section 4(2)(b) of the *Act*. Neither Aviva nor its agent collected or distributed personal information that Mr. Borowski had not already disclosed. I find that, in commencing an application in which his medical condition was in issue, Mr. Borowski implicitly consented to the acquisition by Aviva of expert medical opinions, based on the personal information he was required to disclose.

I appreciate that the Court in *Rousseau* concluded that the doctor conducting the IME was engaged in "commercial activity", triggering the application of the *Act*, while the Court in *Ferenczy* found that the persons conducting the surveillance were not engaged in "commercial activity". I am bound by neither decision and I prefer the *Ferenczy* approach. As noted above, the issue in *Rousseau* was gaining access to personal information collected. That was not the issue in *Ferenczy* and it is not the issue here. Also as noted above, even had I found a breach of the *Act*, I would not exercise my discretion to exclude the reports.

The above reasons also dispose of Mr. Borowski's submission that the reports were obtained in breach of Aviva's Privacy Policy.<sup>18</sup> The Privacy Policy largely adopts the provisions of the *PIPED Act*. The policy specifically contemplates disclosure of personal information to agents and adjusters. As noted above, based on the principles of agency, disclosure to an agent is not

---

<sup>17</sup>At paragraphs 30 and 31

<sup>18</sup>Motion Record, Vol. II, Exhibits Q and R

disclosure to a third party. The policy also specifically provides that consent to disclose is assumed for the purpose of evaluating claims. I find that the purpose of obtaining the subject reports was to assist in the evaluation of Mr. Borowski's claim and that Aviva did not agree, through its privacy policy, that it would not use personal information collected from Mr. Borowski for that purpose.

### **PROBATIVE VALUE vs. PREJUDICE**

Mr. Borowski submits that the reports should be excluded because the authors usurp the role of the Arbitrator by offering their opinion on the proper application of the AMA Guides.

Mr. Borowski also submits that the reports should be excluded because they are of little probative value since the opinions were formed without examining him and are based on an assessment of his credibility. He relies on the decision in *Sharma and Allstate Insurance Company of Canada*<sup>19</sup> in which the Arbitrator refused to exercise his discretion to admit reports prepared by Brigham & Associates which Allstate had served late. In arriving at that decision, the Arbitrator commented unfavourably on the admissibility of opinions offered on how the AMA Guides should be applied. The Arbitrator concluded that the reports were "potentially inappropriate".

The issue in *Sharma* was whether extraordinary circumstances existed that would warrant the exercise of discretion to allow the filing of reports that were not properly served. Here, the reports have been served well in advance of the hearing. Although the opinions that Brigham & Associates offer on the interpretation of the AMA Guides are not properly the subject of expert evidence, the fact that those opinions are offered does not render the entire reports inadmissible. The expression of these opinions goes to the weight to be given to the medical opinions expressed, not their admissibility. The extent to which the medical conclusions are based on incorrect interpretation of the applicable law is a factor to be taken into account in assigning weight. An expert opinion would not be excluded merely because the expert expressed and applied a correct interpretation of the relevant legislation in arriving at an opinion within his or her expertise.

---

<sup>19</sup>(FSCO A07-001223, June 18, 2008)

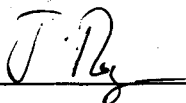
Similarly, the fact that Brigham & Associates did not assess Mr. Borowski in person and might have made assumptions about his credibility are questions of weight, not admissibility. The issue of weight cannot be determined in a vacuum. It must be assessed in light of all of the evidence. It is not possible to determine at this stage of the proceedings whether the assessors would have been in a better position to form an opinion, had they assessed Mr. Borowski in person. It is also not possible to determine whether any assumptions on credibility will accord with my conclusions at the end of the hearing.

**CONCLUSION:**

For all of the above reasons, I find that the reports Aviva obtained from Brigham & Associates are admissible at the Arbitration hearing.

**EXPENSES:**

I reserve my decision on the expenses of the motion until the Arbitration hearing has been completed. I remain seized of the issue, should the parties resolve all other issues without a hearing, but are unable to resolve the issue of expenses of this motion.



---

Jeffrey Rogers  
Arbitrator

September 12, 2008

---

Date

Financial Services  
Commission  
of Ontario

Commission des  
services financiers  
de l'Ontario



FSCO A07-002593

**BETWEEN:**

**JAMES BOROWSKI**

**Applicant**

**and**

**AVIVA CANADA INC.**

**Insurer**

### **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The reports Aviva obtained from Brigham & Associates are admissible at the Arbitration hearing.
2. Aviva does not have an obligation to fund replies to these reports under section 24 or 42 of the *Schedule*.
3. The decision on the expenses of the motion is reserved until the Arbitration hearing has been completed.

A handwritten signature in cursive script, appearing to read "J. Rogers", written over a horizontal line.

Jeffrey Rogers  
Arbitrator

September 12, 2008

Date