IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, section 268 and *REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

LOMBARD CANADA

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION ON PRELIMINARY ISSUES

COUNSEL:

Harry P. Brown for the Applicant

Lisa E. Hamilton for the Respondent

PRELIMINARY ISSUES:

Counsel agreed that the following two questions should be answered by way of a preliminary issues hearing:

1. What are the legal consequences arising out of Wawanesa's receipt of Whitney Graham's application for accident benefits on July 21, 2003?

2. Should Lombard's application for arbitration be dismissed as against Wawanesa, due to its failure to comply with the ninety-day time frame for filing a Notice of Dispute set out in section 3 of *Regulation 283/95* ?

Initially, the parties also posed a question relating to Lombard's right to bring an application for arbitration against Gore Mutual Insurance Company given its failure to do so within ninety days, but both Lombard and Wawanesa agreed prior to the hearing to release Gore Mutual from the proceeding and that issue is no longer before me.

RESULT:

Wawanesa breached section 2 of *Regulation 283/95* by "deflecting" Ms. Graham's application, and as a consequence, cannot now assert that Lombard is prevented from disputing its obligation to pay benefits because it did not provide notice of its intention to do so within ninety days of receipt of the application pursuant to section 3 of the regulation.

Accordingly, the arbitration between Lombard and Wawanesa will proceed to a determination on the merits.

HEARING:

The preliminary issue hearing was held on July 11, 2008, in the City of Toronto, in the province of Ontario, before me, Shari L. Novick, Arbitrator.

BACKGROUND FACTS:

The parties agreed on the facts relevant to my determination of the preliminary issues outlined above, and filed an Agreed Statement of Facts at the hearing. Those facts can be summarised as follows:

Whitney Graham was injured in a motor vehicle accident on June 25, 2003 when the van in which she was a passenger collided with a taxi. The van was driven by David Parrell. The taxi was insured by Lombard Canada ("Lombard").

Ms. Graham does not own a vehicle of her own. She submitted an Application for Accident Benefits to Wawanesa Mutual Insurance Company ("Wawanesa") on July 21, 2003, in which she indicated that Mr. Parrell's van was insured by Wawanesa. Wawanesa returned the application to Ms. Graham on July 25, 2003, advising that it was "unable to give consideration to your claim as Mr. Parrell's automobile policy with Wawanesa Insurance lapsed May 16, 2003".

There is an ongoing dispute regarding whether or not the Wawanesa policy on Mr. Parrell's van was properly cancelled prior to the accident. *For the purpose of the preliminary issue hearing only,* counsel for Wawanesa concedes that the policy was in effect on the date of the accident.

Ms. Graham's application was subsequently forwarded to Lombard on September 16, 2003. The log notes in the Lombard claims adjuster's file contain an entry dated September 22, 2003 stating "App has been sent to Wawanesa and denied – policy is not active on the date of the acc – appears we are primary". Lombard began paying benefits to Ms. Graham shortly afterwards.

Lombard agrees that it neither investigated the priority issue, nor sent out any notices under *Regulation 283/95* until faxing both a Notice to Applicant of Dispute Between Insurers and a Notice Demanding Arbitration to Wawanesa on June 28, 2007. Lombard concedes that this is well beyond the ninety-day period provided for in section 3(1) of the regulation. It does not assert any defence under section 3(2) of the regulation.

The parties also agree that Wawanesa was the first insurer to receive a completed application for benefits from Ms. Graham, and that it similarly did not at any point provide notice of its intention to dispute its obligation to pay benefits under section 3 to any other insurers.

Lombard contends that Wawanesa is in higher priority to pay Ms. Graham's claim under the priority scheme set out in section 268(2) of the *Insurance Act,* given that it is the insurer of the

van in which Ms. Graham was a passenger. Counsel for Wawanesa does not dispute this, in the event that the Wawanesa policy was in effect on the date of the accident.

Gore Mutual is Ms. Graham's mother's insurer. Lombard initially contended that Ms. Graham was dependant on her mother, and that consequently Gore was also in higher priority under section 268 of the Act to pay the claim. It sent a Notice of Dispute to Gore Mutual in June 2007, at the same time notice was provided to Wawanesa. As set out above, Lombard and Wawanesa both agreed prior to this hearing to release Gore Mutual from the proceeding.

Finally, the parties agree that on February 8, 2008, prior to the first pre-hearing teleconference held in this proceeding, counsel for Lombard inquired of counsel for Wawanesa whether her client had received an application for benefits from Ms. Graham. Counsel responded on February 15, 2008 that Wawanesa had no record of ever having received an application from Ms. Graham. Subsequent to that correspondence, counsel for Ms. Graham provided all parties with a copy of the letter from Wawanesa to Whitney Graham dated July 25, 2003, referred to above, returning the application back to Ms. Graham.

RELEVANT SECTIONS OF REGULATION 283/95:

The sections relevant to my determination of the preliminary issues are set out below:

2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 if the Act.

3. **(1)** No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.

(2) An insurer may give notice after the 90 day period if,

(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

PARTIES' ARGUMENTS:

Both counsel made detailed arguments in support of their positions, and analysed the relevant case law. I will summarise their key arguments below.

Applicant's argument

Counsel for Lombard contends that section 2 of the regulation requires the first insurer who receives an application to pay benefits to the applicant, and to then notify other insurers who it thinks are in higher priority that they dispute their obligation to do so. He asserted that there are strong policy reasons underlying this regulatory scheme, namely that injured victims should have their claims dealt with expeditiously and not be "lost in the shuffle" as insurers argue about which policy is primary. Lombard argues that as Wawanesa clearly received the first application from Ms. Graham, and as it never provided notice to any other insurers of its intention to dispute its obligation to pay her, it cannot now turn around and assert that Lombard is in breach of section 3.

Lombard contends that by failing to accept Ms. Graham's application, Wawanesa improperly "deflected" it. Counsel cited various cases in support of the proposition that when there is a sufficient nexus between the applicant and the insurer, the insurer receiving the application is obliged to accept it and pay benefits initially, despite their position that the policy was not in force at the relevant time, or that they are not the priority insurer. He claimed that such a nexus exists in this case, as Mr. Parrell had a valid policy with Wawanesa a few months prior to the accident. Counsel acknowledges that in light of Wawanesa's concession for the purpose of this hearing that the Parrell policy was in force on the date of loss, he need not focus on the nexus issue, but submits that the Regulation clearly requires Wawenasa to have paid benefits upon receipt of the application and to then dispute its obligation to do so within ninety days.

Counsel for Lombard cited the Ontario Court of Appeal's decisions in *Allstate Insurance Co. of Canada v. MVACF* [2007] O.J. 292 and *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* [2007] O.J. No. 290 in support of the above propositions, as well as arbitration decisions of Arbitrator Jones in *Lombard v. Royal and SunAlliance and MVACF*

(Shapwaykeesic) (unreported decision, dated February 20, 2007, currently under appeal), *Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance v. Royal and SunAlliance et al*(unreported, January 2003) and *Liberty Mutual Ins. Co. v. Commerce Insurance Co.* (unreported decision, July 6, 2001, upheld on appeal, [2001] O..J No.5479).

Lombard asserts that the above case law also provides that an insurer who deflects a claim cannot rely upon its misconduct to then shift the obligation to pay to another insurer. Relying on these cases, he contends that it was therefore Wawanesa's obligation, and not Lombard's as is alleged, to provide notice of its intention to dispute its obligation to pay Ms. Graham's benefits claim under section 3 of the regulation.

Respondent's argument

Counsel for Wawanesa framed the issue to be decided as whether or not Lombard should be relieved of its obligation to comply with the 90 day notice requirement in subsection 3(1) of Regulation 283/95, given that "Wawanesa may have been obliged to commence payment of benefits" to Ms. Graham pursuant to section 2.

Counsel noted that while section 2 of the regulation provides that the "first insurer" that receives a completed application is responsible to pay benefits, section 3 specifies that "no insurer" may dispute its obligation to pay unless it provides ninety days notice of that intention. She contends that this distinction must be interpreted to mean that even if Wawanesa was obliged to pay benefits pending the ultimate resolution of the issue, section 3 can still be invoked against Lombard for its late notice. She notes that Lombard does not assert any defence under section 3(2), and submitted that section 3(1) was therefore fatal to its claim.

Wawanesa relied on the Court of Appeal's findings in the *Kingsway General Insurance Co. v. West Wawanosh Insurance* [2002] O.J. No. 528 case in this regard. Counsel submitted that in that case, West Wawanosh was ordered to continue to pay benefits when they had failed to provide notice of their intention to dispute their obligation to pay within ninety days, despite the law having changed in the interim. Counsel noted the court's comments regarding the need for clarity and certainty to ensure a predictable and efficient scheme of dispute resolution among

insurers in priority disputes, and contended that the situation in this case, involving a changing awareness on Lombard's part of the relevant facts surrounding the application, was analogous to the change in the law in the West Wawanosh decision.

Counsel for Wawanesa distinguished the other cases relied on by Lombard set out above. She contended that as the *Liberty Mutual v. Commerce Insurance* appeal decision predated the two Court of Appeal decisions in *Kingsway General v. Ontario (Min of Finance), supra*, and *Allstate Insurance v. MVACF, supra*, it was therefore not as authoritative as the others that followed these decisions. She asserted that once Lombard made the decision to pay benefits back in 2003 when it received Ms. Graham's application and determined that it was in priority, it cannot now, well beyond the ninety day period provided for in section 3, turn around and argue that Wawanesa breached section 2 of the regulation.

Applicant's Reply

In his Reply submissions, counsel for Lombard asserted that section 3 of the regulation cannot be looked at in isolation, and that it must be considered in tandem with section 2. He asserted that Wawanesa's role in this case was analogous to that of Kingsway in the *Kingsway v. Ontario, supra*, case cited earlier, and he noted Justice Laskin's comments in directing that the matter be remitted back to the arbitrator, as follows –

> If the arbitrator finds Kingsway was not an insurer, then he can consider the question of the appropriate order in light of that finding. His consideration should then include not only the effect of Kingsway's breach of section 2 of regulation 283, but as well the effect of Kingsway's failure to give timely notice of its intent to dispute its obligation to pay in accordance with section 3 of the regulation.

Counsel submitted that these comments contain a clear direction from the court that the insurer who deflected the application and breached section 2 is also subject to the time limits in section 3, and argued that they should be applied against Wawanesa in this case.

FINDINGS / ANALYSIS:

The issue raised in this case has been considered before both by arbitrators and the courts. However, given the concessions that the parties have made here - Wawanesa accepting that its policy was in force on the date of loss for the purpose of this hearing, and Lombard conceding that it cannot maintain a defence under section 3(2) of the regulation - the question can be posed in an unusually stark way: Can an insurer who has breached section 2 assert that the second insurer who receives the application and pays benefits is prevented from pursuing the first insurer for the benefits it paid out because it failed to provide notice of its intention to do so within the 90 day timelines provided in section 3?

Put another way, can Wawanesa, having deflected Ms. Graham's application, escape the consequences of not having provided notice under section 3 of the Regulation while arguing at the same time that they should be invoked against Lombard?

In my view, the clear answer is that they cannot. My reasons for so finding are based on the wording of the regulation, the relevant case law, and the policy reasons underlying the regulatory scheme, as set out in several of the cases cited above.

Looking first to the policy reasons, the Financial Services Commission of Ontario (then known as the Ontario Insurance Commission) issued a Policy Bulletin in May 1995 at the time that the Priority Regulation came into force. While the bulletin does not create a binding precedent for arbitrators, it is instructive on the reasons behind the provisions. It states –

> The new Regulation provides protection to injured accident victims who may be entitled to benefits and are caught in the middle of these disputes. Insurers that receive an application for accident benefits will now be required to pay benefits pending the resolution of these disputes.

The background section of the bulletin explains that priority disputes between insurers are often not easy to resolve, and that claimants have been subject to delays in receiving payments. It is clear that the "pay now, dispute later" rule, embodied in section 2 of the regulation, was developed to remedy this problem.

It is against this backdrop that I must consider the question in this case. Given its place at the beginning of the regulation, and given the policy reasons stated above, I find that the rule that the first insurer to receive a completed application must pay first and then dispute is a fundamental, and even primary, part of the regulatory scheme.

The most persuasive authority on this point is the Court of Appeal's decision in *Kingsway General vs. Ontario, supra*, and in particular Justice Laskin's comments as follows –

> Section 2 of regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies section 2 is that the first insurer to receive an application for benefits must pay now and dispute later. The rational for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay, or as in this case, by an insurer's claim that no policy of insurance existed at the time.
>
> Insurers cannot avoid their obligation under section 2 by claiming that another insurer should pay or that an insurance policy was cancelled shortly before the accident. If they could deny an application for benefits on either of these grounds, section 2 would be rendered meaningless.

The nexus test has been established to act as a safeguard for abuse or outright unfairness in this regard, as provided in *Allstate Insurance v. Brown* [1998] O.J. No. 2318 and subsequent decision.

The Kingsway case cited above highlights the importance of section 2 of the regulation, although the Court of Appeal's findings also clarify that a breach of that section does not result in the insurer that deflected the application having to ultimately pay the claim, if it did not have a valid policy in effect at the relevant time. Justice Laskin agreed with the Superior Court judge's finding that the question of whether Kingsway Insurance was in fact an insurer should be remitted back to the arbitrator, although I note that he raised the question of whether a "sanction can and should be imposed for Kingsway's breach of section 2". And, most importantly for our purposes, he also provides the direction to the arbitrator cited by counsel for Lombard above that

Kingsway's failure to provide notice in accordance with section 3 should also be taken into account.

I was advised by counsel that the parties involved in the Kingsway case settled the matter prior to the arbitrator having to make a further determination on that question, and consequently, that case does not provide any further guidance on this issue.

While the above decision can be seen as an indirect endorsement of Lombard's argument in this case, the issue is addressed more squarely in the *Lombard vs. Saskatchewan Government Insurance case, supra*. In that case, Lombard received the first application for benefits and deflected it. The Motor Vehicle Accident Claims Fund subsequently began paying benefits to the claimant, but after investigating and receiving further information, filed a Notice of Dispute both with Lombard and SGI. Lombard argued, among other things, that the Fund was precluded from pursuing Lombard because its notice was delivered outside of the ninety-day period provided in section 3 of the regulation.

Justice Spiegel upheld the arbitrator's decision to the effect that the Fund was permitted to pursue its application against Lombard, finding not only that section 3(2) could be invoked to "save" the Fund's provision of late notice, but that Lombard should not be permitted "to rely on a limitation period for a Notice that should never have been the responsibility of the MVACF or SGI to give…" Justice Spiegel went on to find that "Lombard should have dealt with the claim and given the Notice." This decision is directly on point and provides a clear direction on the issue before me.

I note two other appeal decisions in which courts have upheld arbitrators' findings that insurers cannot invoke section 3 arguments if they, as the first insurer to have received the application and deflected it, did not provide such notice. In *Liberty Mutual v. Commerce Insurance, supra*, Justice Lissaman upheld the arbitrator's findings that as the first insurer to have received an application for benefits, Commerce Insurance could not then turn around and assert an argument under section 3 that they themselves have not abided by. Finally, in *Primmum Insurance v. Allstate Insurance Company of Canada* (unreported decision, March 22, 2007, upheld on appeal

November 19, 2007, unreported), the court also agreed with Arbitrator Jones' finding that Allstate could not "point the section 3 finger" at Primmum when they had deflected the claim and not provided any notice under section 3 of their intention to dispute their obligation to pay benefits.

I agree with the reasoning in the above decisions, and in any event, am bound by the courts' findings.

Counsel for Wawanesa relied heavily on the Court of Appeal's decision in *Kingsway General v. West Wawanosh Insurance, supra.* She contended that a change in the law, which was the reason behind the delay in providing notice in that case, was analogous to a changing awareness on Lombard's part in this case that the first application had been sent to Wawanesa. In my view, this analogy does not hold. I find that the *West Wawanosh* decision is distinguishable from the instant case, as the focus of the court's discussion in that case was on whether or not the 'saving provisions' in section 3(2) should be invoked, given the change in the law. Lombard is not asserting a section 3(2) defence in this case.

And, while I agree with the concerns expressed by Justice Nordheimer in the initial appeal decision in *West Wawanosh* regarding the importance of clarity and certainty, and there being little room for creative interpretations of the Regulation, I do not agree with Wawanesa's contention that these comments support their position in this case. On the contrary, I find that the requirement in section 2 that the first insurer to receive a completed application should pay is clear, and when ignored by insurers it should predictably result in their not being able to take the offensive and assert that the second insurer who abides by the regulation and does pay benefits is prevented from proceeding because it provided late notice.

Finally, Wawanesa argues that the phrase "no insurer may dispute its obligation to pay benefits unless it gives written notice within 90 days" in section 3 of the regulation is a bar to Lombard proceeding in this case. Essentially, counsel contends that the phrase "no insurer" is broader than the phrase "first insurer" appearing in section 2, and that this distinction must signify the drafters' intentions to constrain any insurer from filing a dispute beyond 90 days, regardless of

the prior history of the claim. While a technical reading of the regulation initially may support that view, I find that in light of the policy concerns underlying the regulation stated above as well as the extensive case law cited, that argument cannot hold.

It is a well-established principle of statutory interpretation that all provisions in a statute or regulation must be considered to have meaning, and that the enactment must also be considered in its overall context. While section 3(1) contains strong language suggesting a bar to proceeding if notice is not provided within 90 days, subsection 3(2) then sets out "saving provisions" under which late notice can be excused. Section 2 likewise provides clear instructions surrounding the receipt of a first application for benefits: when all of these are read together in the overall context of providing a workable procedure for resolving priority disputes among insurers, it is clear that the scheme requires insurers who first receive applications to pay benefits, to then dispute their obligation to do so in a timely manner if they feel they are not primary, and that there may be occasions when the provision of late notice will be permitted. The notion that some parts of the scheme can be ignored outright while others are to be applied rigidly, as Wawanesa's argument implies, is not in keeping with the above principles.

Consequently, I find that Lombard is not prevented from pursuing its application for arbitration against Wawanesa, and accordingly, the matter shall proceed on the merits.

Dated at Toronto, this _____ day October 2008.

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Shari L. Novick

Arbitrator