Dec 7, 2009 (J)

WAWANESA MUTUAL INSURANCE COMPANY
Applicant
and
LOMBARD CANADA
Respondent
Court File No: CV-08-00365821-00000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPLICATION RECORD

Bell, Temple
Barristers & Solicitors
393 University Avenue, Suite 1500
Toronto, ON M5G 1E6

Lisa E. Hamilton, LSUC # 31877U
Tel.: (416) 581-8206
Fax: (416) 596-0969

Lawyers for the Applicant

Endorsement for *Wawanesa v Lombard* – Disputes between Insurers – Reg. 283/95.
[Also see related Endorsement in *Lombard v. Wawanesa*, CV – 09-379834]

December 7, 2009

Ms. Hamilton and Mr. Abreu for Applicant Wawanesa; Mr. Brown for Respondent Lombard.

Appeal from "Preliminary Issue" decision of Arbitrator Shari Novick dated Oct. 27, 2008.

I agree with the arbitrator's interpretation of ss.2 and 3 of Reg. 283/95. If Wawanesa, as the "first insurer" refuses an application to pay benefits and breaches s.2 and fails to provide the required notice under s.3, it cannot then "take the offensive" and point the finger at Lombard, the second insurer (who receives the application and pays the benefits) for failing to comply with the notice requirement in s. 3.

In detailed and careful reasons, the arbitrator correctly summarized the relevant case law and the underlying policy of Reg. 283/95. She did not engage in "creative interpretation." I find no errors in her analysis. Wawanesa's appeal is therefore dismissed.

Ed Belobaba J.

CITATION: Wawanesa Mutual Insurance Company v. Lombard Canada, 2010 ONCA 383
DATE: 20100527
DOCKET: C51490 & C51545

COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and Blair JJ.A.

BETWEEN

Wawanesa Mutual Insurance Company

Applicant (Appellant)

and

Lombard Canada

Respondent (Respondent in Appeal)

AND BETWEEN

Lombard Canada

Applicant (Appellant)

and

Wawanesa Mutual Insurance Company

Respondent (Respondent in Appeal)

Lisa E. Hamilton and Derek V. Abreu, for Wawanesa Mutual Insurance Company

Harry P. Brown and Chris Whibbs, for Lombard Canada

Heard and released orally: May 19, 2010

On appeal from the orders of Justice Edward P. Belobaba of the Superior Court of Justice dated December 7, 2009.

By the Court:

[1] These companion appeals involve the consideration of two decisions rendered by an arbitrator and the subsequent applications to have both decisions set aside.

[2] Whitney Graham was injured in a car 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.

[3] Ms. Graham submitted an application for accident benefits to 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, with a note written on it to the effect that Mr. Parrell's policy had lapsed.

[4] Ms. Graham then sent the same application for accident benefits to Lombard. Shortly thereafter, Lombard began paying her accident benefits.

[5] Some four years later, Lombard sent out a "Notice to Applicant of Dispute Between Insurers". It also sent Wawanesa a "Notice Demanding Arbitration" (the "Priority Dispute Arbitration").

[6] The parties agreed that Wawanesa was the first insurer to receive a completed application for accident benefits. Section 2 of O. Reg. 283/95 (the "Regulation") requires the first insurer to receive a completed application for accident benefits to pay benefits, pending the resolution of any dispute as to which insurer is required to pay benefits under s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[7] At the first preliminary hearing, Arbitrator Novick held that Wawanesa breached s. 2 of the Regulation by "deflecting" the application. She further held that Wawanesa could not rely on s. 3 of the Regulation to prevent Lombard from disputing its obligation to pay benefits, even though Lombard failed to provide notice of its intention to do so within ninety days of receipt of the application, as required by s. 3 of the Regulation. Section 3(1) provides that:

> 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.

[8] The arbitrator ordered that the Priority Dispute Arbitration should proceed.

[9] In her second preliminary decision, Arbitrator Novick held that even though Wawanesa breached s. 2 of the Regulation and did not give notice under s. 3(1), it was not precluded from disputing who the priority insurer was.

[10] Wawanesa brought an application asking that the first preliminary decision be set aside and for an order that Lombard had priority to pay Whitney Graham's accident benefits. Lombard brought an application asking that the second preliminary decision be set aside and for an order precluding Wawanesa from continuing to dispute that it was the priority insurer.

[11] Justice Belobaba heard the applications. He agreed with the arbitrator's reasoning and result in both preliminary decisions and dismissed the applications.

[12] In respect of the first preliminary decision, the applications judge stated:

> I agree with the arbitrator's interpretation of ss. 2 and 3 of Reg. 283/95. If Wawanesa, as the "first insurer" refuses an application to pay benefits and breaches s. 2 and fails to provide the required notice under s. 3, it cannot then "take the offensive" and point the finger at Lombard, the second insurer (who receives the application and pays the benefits) for failing to comply with the notice requirement in s. 3.

[13] The applications judge also found that the arbitrator had correctly summarized and applied the relevant case law and the underlying policy of the Regulation.

[14] In respect of the second preliminary decision, the applications judge agreed with the arbitrator that this court's decision in *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* (2007), 84 O.R. (3d) 507 (C.A.), was determinative. He concluded that even though Wawanesa ought to have paid benefits pending a determination of whether it was an "insurer" (i.e. whether the Parrell policy had been validly cancelled),

Wawanesa ought not to be required to pay benefits permanently. He held that the arbitrator had correctly concluded, based on *Kingsway*, that "a breach of s. 2, while a serious matter that deserves sanction, does not result in an insurer automatically being required to pay benefits to the claimant forever". Thus, the applications judge held that the arbitrator correctly ruled that the Priority Dispute Arbitration had to proceed to determine whether a valid Wawanesa policy existed at the time of the accident.

[15] Wawanesa appeals the order upholding the first preliminary decision. Its main argument on appeal is the same as that advanced at both levels below. It submits that because Lombard did not comply with the 90-day notice requirement in s. 3(1) of the Regulations and it did not satisfy the two-part "saving provision" in s. 3(2), Lombard was barred from disputing priority.

[16] Lombard appeals the order upholding the second preliminary decision. It too advances the same arguments as were made below. In sum, it contends that as Wawanesa was in breach of both ss. 2 and 3 of the Regulations, it is not now entitled to dispute its obligation to pay benefits.

[17] In the circumstances of this case, we see no error in the reasoning and results below. Accordingly, we would dismiss both appeals. Like the applications judge, we do so for the reasons given by the arbitrator in the two preliminary decisions.

[18] Success being divided, there will be no order as to costs.

RELEASED: JCM MAY 27 2010

J.C. MacPherson J.A.
E.E. Gillese J.A.
R.J. Blair J.A.