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

SECOND DECISION ON PRELIMINARY ISSUES

COUNSEL:

Harry P. Brown for the Applicant

Lisa E. Hamilton for the Respondent

BACKGROUND:

This arbitration arises out of a motor vehicle accident that took place on June 25, 2003, in which Whitney Graham was injured when the van she was riding in collided with a taxi.

Ms. Graham initially forwarded an application for accident benefits to Wawanesa. It returned her application, and advised that the policy under which she was claiming benefits (allegedly covering the van) had lapsed prior to the date of the accident. This issue – which I will refer to as the "cancellation issue" - remains in dispute between the parties.

Ms. Graham subsequently sent her application on to Lombard, the insurer of the taxi involved in the accident. Lombard began paying her benefits. Lombard later took the position that Wawanesa was in higher priority than it was to pay the claim, and sent the requisite notice to Wawanesa under section 3 of *Regulation 283/95*. The notice was sent well beyond the ninety-days prescribed in the regulation.

Counsel identified two preliminary issues in the course of our pre-hearing discussions, and it was agreed that those would be determined at a preliminary issues hearing to be held on July 11, 2008. A Statement of Agreed Facts was filed by the parties, and a hearing was convened at which I heard detailed submissions from counsel. The issues were framed as follows:

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 ?***

For the purpose of the determination of the second issue, counsel for Wawanesa conceded that its policy was valid on the date of the accident.

On October 27, 2008 I issued my decision on the preliminary issues. My findings were set out in the "Result" portion of the decision. They read as follows:

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.

Subsequent to the release of this decision, counsel for Lombard wrote to me and to opposing counsel and advised that in his view, I had "not fully answered the Preliminary Issue No. 1". Counsel for Wawanesa did not agree with that view. She advised, however, that Wawanesa was appealing my finding on the "ninety day issue". Lombard subsequently filed its own appeal of the decision, alleging that I either neglected or refused to answer the first question posed.

A further pre-hearing teleconference was convened with counsel to discuss how the matter should proceed further. The parties' positions on the legal consequences that flow from my findings were discussed. Mr. Brown took the position that my preliminary decision effectively ends the priority dispute, and that Wawanesa becomes the priority insurer liable to pay benefits to Ms. Graham into the future. Ms. Hamilton disagreed, and submitted that the ultimate question of whether or not Wawanesa was an "insurer", given

its position that the policy had been validly cancelled before the date of loss, must still be determined.

Counsel for Wawanesa also advised that the question of whether or not the Wawanesa policy was validly cancelled before the date of loss was in issue in the tort claim, and that the broker involved had been added as a third party. She submitted that this arbitration should be adjourned, pending the court's determination on the cancellation issue. Counsel for Lombard did not agree with this approach.

I was also advised by counsel that both appeals had been put on hold by the "triage court", in order to provide me with the opportunity to decide whether or not to make any further rulings on "preliminary question #1".

It was decided that a second arbitration hearing would be convened, and the following two questions addressed –

1. ***What are the legal consequences that flow from my findings in the decision on preliminary issues, released on October 27, 2008 ?***

2. ***If Wawanesa does not automatically become the priority insurer as a result of my earlier findings, should my determination on the issue of whether or not the Parrell policy was validly cancelled by Wawanesa be deferred, pending the court's determination on that issue in the tort claim?***

Further factums were filed, and a hearing was convened on March 9, 2009.

PARTIES' SUBMISSIONS:

What are the legal consequences that flow from my finding on the ninety-day issue?

Counsel for Lombard asserts that given the parties' agreement both that Wawanesa was the first insurer to receive Ms. Graham's application for benefits, and that it did not at any time provide notice to Lombard of its intention to dispute its obligation to pay benefits, Wawanesa automatically becomes the payor of Ms. Graham's accident benefits for all time. He argues that my finding on the "ninety-day" issue mandates this conclusion. He also contends that this result is clearly dictated by the regulation and the relevant jurisprudence, regardless of whether or not Wawanesa is the 'true' priority insurer under section 268(2) of the Act. In essence, counsel contends that once Wawanesa has been found to have breached sections 2 and 3 of *Regulation 283/95*, it has no entitlement to dispute priority, and consequently the arbitration is over.

In support of his position, Mr. Brown relies on the Court of Appeal's decision in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* [2002] O.J. No. 528, the appeal decision in *Liberty Mutual Insurance Co. v. Commerce Insurance Co.* [2001] O.J. No. 5479, the appeal decision in *Lombard v. Royal & SunAlliance and MVACF (Shapwaykeesic*) [2008] O.J. No. 5239, as well as Justice Laskin's comments in the Court of Appeal's decision in *Kingsway General Insurance Co. v. (Ontario) Minister of Finance* [2007] O.J. No. 290. He contends that these authorities all emphasize the importance of the "pay now, arbitrate later if necessary" principle that is embodied in sections 2 and 3 of the regulation.

Mr. Brown specifically cited Justice Lissaman's finding in *Liberty Mutual v. Commerce, supra,* to the effect that "having received the first completed application for benefits, Commerce Insurance failed to pay the benefits, and did not serve a Notice of Dispute within the ninety day period pursuant to section 3 of Regulation 283/95", and accordingly it was required to pay benefits to the claimant.

He also focused on Justice Strathy's findings and comments in upholding Arbitrator Jones' arbitration award in *Lombard v. Royal & SunAlliance and MVACF (Shapwaykeesic), supra,* on this point. He noted that the judge agreed with the arbitrator's finding that Lombard, who was the first insurer in that case to have received the

application, was required to pay benefits indefinitely and without recourse to Royal, the insurer in higher priority, when timely notice had not been provided.

Counsel for Wawanesa took a different view. She contended that both questions put before me at the first hearing had been answered in my decision. She noted my finding that Wawanesa cannot assert that Lombard is prevented from pursuing the arbitration because it did not provide notice within ninety days. She contended that my further finding that the arbitration would proceed to a determination on the merits clearly suggests that the next step in the process is to address the "cancellation issue" so that a determination could be made as to whether or not Wawanesa was an "insurer".

Counsel also asserted that given her concession that the Wawanesa policy was valid on the date of the accident *for the purpose of the second preliminary issue only*, (*i.e. the ninety-day issue),* the only finding that I could have made was that Lombard was not precluded from pursuing the arbitration on account of failing to give notice within 90 days of receiving the application. She disagreed with Mr. Brown's contention that having made this finding, I should order Wawanesa to pay benefits to Ms. Graham for all time, and cited the Court of Appeal's decision in *Kingsway v. Ontario (MVACF), supra,* as authority for the proposition that an insurer found to have received the first application for benefits is <u>not</u> automatically considered to be the priority insurer merely because it received the first application.

If the arbitration continues, should the "cancellation issue" be deferred, pending the court's determination in the tort claim?

Counsel for Lombard submitted that *Regulation 283/95* imposes a mandatory scheme on all insurers involved in priority dispute arbitrations in the province, and provides me with exclusive jurisdiction to determine all issues raised in an arbitration proceeding. He contended that Wawanesa cannot simply opt out of this, because they would rather have the court determine this issue. He stated that the regulation contemplates that arbitrations

would be conducted in an expeditious manner, and that the parties involved should not have to wait a few years, until the tort action is concluded, to have their dispute resolved.

Mr. Brown also noted that the broker is not a party to the arbitration, and would therefore not be bound by the result.

Ms. Hamilton contended that while not a party to the arbitration, the broker involved would be an essential witness whose evidence would be critical to my decision on this issue. She stated that as he is not a party to the arbitration process, he would not have the benefit of his own counsel, and that he could be prejudiced by being required to provide evidence in this forum, given the allegations levied against him in the tort claim.

Counsel could not advise what stage the tort action was at. However, she asserted that Lombard would not be prejudiced in any way by awaiting the court's determination on this issue, noting that it had waited almost four years to bring the arbitration against Wawanesa.

Neither counsel provided any authorities in support of their positions on this issue.

FINDINGS & ANALYSIS:

What is the legal effect of my finding on the ninety-day issue?

As provided above, my findings in the earlier preliminary decision are set out in two paragraphs under the heading "Result". The two issues I was asked to determine are linked, and the answers overlap. The real question is – having admittedly deflected the first application for benefits, can Wawanesa argue that Lombard should be prevented from pursuing them because Lombard failed to provide notice of its intention to do so within ninety days? I found that assuming a sufficient nexus exists, an insurer who breaches section 2 of the regulation and deflects an application for benefits it receives,

and who does not provide notice under section 3, cannot 'take the offensive' and point the finger at the second insurer who receives the application and does pay benefits, even though their notice is sent beyond the ninety days provided for in the regulation.

It is important to note that when the questions for preliminary determination were initially formulated, there was a third issue that related to Lombard's right to pursue Gore Mutual, given its failure to provide notice to them within ninety days. It was agreed prior to the hearing, however, that Gore Mutual would be released from the proceeding and consequently, that question was not put before me to determine. The analysis that would have been required to determine Lombard's right to pursue Gore Mutual, given its breach of section 3, would have been different than that pertaining to Wawanesa, as Gore had not "deflected" an application (nor received one). I highlight this at this point because the fact that both responding insurers were raising the "ninety day" issue against Lombard led to the questions being worded in the way that they were.

Having disposed of Wawanesa's preliminary procedural argument, I then ruled that the arbitration would proceed to a determination on the merits. That, along with my earlier finding set out above, is the answer to the first question put before me regarding the legal consequences of Wawanesa's deflection of the application. The merits referred to relate to the question of whether or not the Wawanesa policy was in place on the date of the accident, or whether it had been previously cancelled by the broker, as Wawanesa alleges. If the policy was not in place on the date in question, Wawanesa would not be an "insurer", and would not therefore be required to pay benefits to Ms. Graham. If it was in place, the parties agree that as an insurer of the vehicle in which Ms. Graham was an occupant, Wawanesa would be in higher priority to Lombard, as insurer of another vehicle involved in the incident, to pay benefits to Ms. Graham pursuant to section 268(2) of the Act.

Mr. Brown submits that I have not answered the first question put before me. It is clear, however, that the essence of his argument lies with the result or conclusion I have reached on the issue. He clearly holds a different view of what result should flow from

my dismissal of Wawanesa's preliminary argument: instead of proceeding on to a determination of the cancellation issue, Mr. Brown contends that the regulation and the jurisprudence require me to find that an insurer who is found to have sufficient nexus to the applicant but "deflects" their application, should be found to be liable to pay benefits for all time.

I do not agree with this view. While I acknowledge that the cases prior to 2007, such as the *Liberty v. Commerce* decision referred to above, suggest that an insurer who is found to breach section 2 should be penalized by being required to pay benefits for all time, the case of *Kingsway v. Ontario (Min of Finance), supra,* decided in 2007 by the Court of Appeal, changed or clarified the law in this regard.

In that oft-cited case, the arbitrator found that Kingsway had a sufficient nexus to the claimant, despite its allegation that its policy had been cancelled prior to the date of the accident. He then determined that pursuant to section 2 of the regulation, Kingsway should have paid benefits to the claimant upon receiving her application for benefits and subsequently disputed its obligation to do so. The arbitrator ordered that as a result of its breach of section 2, Kingsway was liable to pay the claimant's benefits permanently.

Kingsway appealed this decision, and while there were other important issues addressed in the appeal, Justice Dambrot determined that despite the fact that Kingsway ought to have paid benefits pending a determination of the issue of whether or not they were an "insurer", Kingsway should *not* be ordered to pay benefits permanently. He ordered the question to be remitted back to the arbitrator, so that he could determine the question of whether or not Kingsway was an "insurer". On appeal to the Court of Appeal, Justice Laskin agreed with the lower court's finding on this point.

Despite finding that Kingsway's refusal to pay was particularly egregious because the result of its actions was to transfer the initial financial burden to the publicly funded Motor Vehicle Accident Claims Fund, Justice Laskin makes the following comments which I find to be determinative of the issue before me:

> [22] What remedy should be imposed for Kingsway's breach? It is tempting to agree with the remedy the arbitrator imposed: require Kingsway to pay Irene Legarde's accident benefits regardless of whether it was an insurer at the time of the accident. The arbitrator no doubt considered – with justification – that insurers would not take their obligation under section 2 seriously unless some penalty was imposed for its breach.
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> [23] As tempting as it is to restore the arbitrator's award, I think that the appeal court judge was correct in requiring the arbitrator to determine whether Kingsway was an insurer at the time of the accident. The arbitrator might well have made that finding as he seemed to conclude that Kingsway's own errors led it to cancel Frances Legarde's insurance policy. On reflection, the arbitrator may determine that Kingsway had no valid grounds to cancel the policy and therefore the policy was in effect at the time of the accident. If so, it will be unnecessary to consider whether a sanction can and should be imposed for Kingsway's breach of section 2.
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> [24] If the arbitrator finds Kingsway was not an insurer, then he can consider the question of the appropriate order in the 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.
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> [25] I would therefore uphold the appeal court judge's order remitting to the arbitrator the question whether Kingsway was an insurer when the accident occurred.

As I read the above passages, Justice Laskin confronts the argument Lombard is making in this case head on, and rejects it in favour of the approach I determined should be followed in my earlier decision, endorsed by Wawanesa here. He finds that the matter should be remitted to the arbitrator to determine whether or not Kingsway was an insurer at the time of the accident. He states that if the arbitrator determines that Kingsway invalidly cancelled the policy and that it was therefore in effect at the relevant time, he need not consider whether a sanction should be imposed on Kingsway for its breach of section 2. Importantly, he also allows for the fact that the arbitrator may find that Kingsway was <u>not</u> an insurer on that date, and in that scenario, suggests that he may

consider an appropriate sanction in light of its breach of sections 2 and 3 of the regulation.

I am bound by this express finding of the Court of Appeal. This decision clearly states that a breach of sections 2 and 3, while a serious matter that deserves sanction, does not result in an insurer automatically being required to pay benefits to the claimant forever. It clarifies that a further, ultimate step in the analysis must be undertaken – namely to determine whether a valid policy exists on the date of the accident. While there are strong policy reasons underlying Lombard's argument in this case, which I note were cited both by Justice Dambrot and Justice Laskin in their respective decisions, my read of this decision is that the courts have now made it clear that the inquiry should continue on to a determination of whether an insurer who is in breach of section 2 of the regulation had a policy in place at the time of the accident.

Mr. Brown cited the reasons of Justice Strathy in the appeal decision in *Lombard v. Royal and SunAlliance and MVACF (Shapwaykeesic), supra,* in his submissions. Lombard argued in that case that the result of finding that it must pay benefits to the claimant despite the fact that Royal was in higher priority under the priority scheme was punitive, and provided a windfall to Royal. Justice Strathy stated:

> In my view, there is much to be said for an inflexible rule that an insurer who fails to pay benefits and fails to put other insurers on notice on receipt of an application, with which there is some nexus, should be found permanently responsible for the claimant's benefits. This promotes compliance with the statutory scheme. It is no more inequitable than fixing permanent responsibility on the first insurer, who initially pays the claim but fails to give timely notice to the other insurer under subsection 3(2). It is not necessary, in this case, to decide whether the rule should be inflexible. It is sufficient to say that I agree with the Arbitrator's decision on the facts of thisparticular case.

While he emphasizes the policy reasons underlying section 2, Justice Strathy then goes on to say that it is not necessary in this case to decide the point, stating that he agrees with the arbitrator's decision on the facts of that particular case. I note, however, another

paragraph in his reasons, which Mr. Brown did not refer to. At paragraph 59 of the decision, Justice Strathy refers to the comments of Justice Laskin in *Kingsway v. Ontario*, s*upra,* excerpted above. He quotes from the decision, and notes –

> By implication, the Court of Appeal did not conclude that the insurer's breach of section 2 would automatically give rise to an obligation to pay benefits indefinitely.

While it may be that Justice Strathy does not agree with Justice Laskin's findings on the issue, he would also be bound by the Court of Appeal's finding on this point. Consequently, this decision does not assist Lombard in this case.

As set out above, I do not accept Lombard's argument that the legal effect of my decision to dismiss Wawanesa's preliminary argument on the "ninety day issue" in this case leads to the conclusion that Wawanesa automatically becomes the priority insurer responsible to pay Ms. Graham's benefits. Accordingly, the question of whether Wawanesa was an "insurer" on the date in question, which raises the issue of whether the policy held by the driver of the van was validly cancelled prior to the date of the accident, must now be determined.

Should the "cancellation issue" be deferred, pending the court's determination in the tort claim?

Given my finding above that this issue remains to be determined, I must address Wawanesa's argument that the question of whether its policy was validly cancelled prior to the date of the accident should be deferred, pending the court's decision on this issue in the ongoing tort claim.

I do not accept this argument. *Regulation 283/95* provides me with exclusive jurisdiction to determine all issues raised between insurers engaged in priority disputes. The question of whether or not the Wawanesa policy issued to David Parrell, the driver of the van in which Ms. Graham was a passenger, was validly cancelled prior to the accident is at the crux of the parties' dispute under the regulation. If the policy was not validly cancelled

and therefore remained in effect, Wawanesa would be the priority insurer under section 268(2) of the *Act*, given that Ms. Graham was an occupant of that vehicle. If the policy was not in force on the date in question, Lombard, as insurer of "another vehicle involved in the incident" would be the priority insurer.

The arbitration process provided for in *Regulation 283/95* is meant to be simple and expeditious. The Court of Appeal has stated in *Kingsway v. West Wawanosh Insurance,* (2002) 58 O.R. (3d) 251 that the regulation "sets out in precise and specific terms a scheme for resolving dispute between insurers". The court did not state that the regulation provides arbitrators with concurrent jurisdiction with the courts on these issues, nor was counsel for Wawanesa able to provide me with any cases in which a court has determined that an arbitration should be adjourned in the event that the same issue is raised in the context of a tort action. From what I have been able to glean from counsel, if this arbitration is adjourned pending the court's determination on this issue, the result is unlikely to be obtained for at least a year, and possibly much longer.

Wawanesa's main concern appears to be that the broker, who is not a party to the arbitration but is a party to the tort claim, will suffer prejudice by giving evidence in this proceeding. This concern is valid, and understandable in the circumstances. However, there are procedural safeguards that can be put in place to ensure that this concern is minimized or allayed. I am open to discussing the available options with counsel, but two possibilities that occur to me are either to have the broker appear with counsel so that he is made aware of his rights and the consequences of his providing testimony at the arbitration, or perhaps more practically, to restrict the use that the transcript of his evidence may be put to.

Accordingly, the arbitration will continue as directed in my earlier decision, and the parties will address the issue of whether or not the Wawanesa policy was validly cancelled prior to the date of the accident.

I will have my assistant contact your respective offices to schedule a pre-hearing discussion so that we can discuss the conduct of the arbitration, including the issue of what procedural safeguards can be put in place to minimize the prejudice to the broker as outlined above.

DATED AT TORONTO, ONTARIO this _____ day of MAY, 2009.

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Shari L. Novick
Arbitrator