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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PEMBRIDGE INSURANCE COMPANY

Applicant

- and -

SOVEREIGN GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Daniel Strigberger for the Applicant

Cameron Grant for the Respondent

BACKGROUND:

1. Brianna Hennessy was injured when she was struck by a taxi as she was crossing King Street in downtown Toronto on November 10, 2014. She was thirty-years old at the time, and lived in Ottawa. Ms. Hennessy suffered a triple C1 fracture and other serious injuries.

2. Ms. Hennessy's parents were insured by Pembridge Insurance Company ("Pembridge") at the time. A form containing basic details of the loss was sent by their broker to Pembridge on November 21, 2014, requesting that a claim be opened. A junior claims adjuster named Archuna Wignarajah was assigned to the claim a few days later and took steps to investigate priority. The file was closed a few months later, when no Application for Accident Benefits (OCF1 form) was received by Pembridge.

3. The taxi that struck Ms. Hennessy was insured by Sovereign General Insurance Company ("Sovereign"). Sovereign also received a Notice of Loss form from its broker after the accident. It retained an outside adjusting firm (Claimspro) to handle the claim, and an adjuster named Fred Duz was assigned to the file. Sovereign received an Application for Accident Benefits form (OCF 1) from Ms. Hennessy on December 10, 2014.

4. Mr. Duz conducted a priority investigation in the weeks that followed. He provided notice on January 28, 2015 to four insurers, one of whom was Pembridge, that Sovereign disputed its obligation to pay benefits to the Claimant. He then received a letter from Mr. Wignarajah at Pembridge a few days later, advising that Pembridge had agreed to take over priority for the claim.

5. Ms. Hennessey's file was transferred to Pembridge, and was assigned to a senior adjuster with more experience in priority disputes. She determined that Mr. Wignarajah had accepted priority in error. Instead of advising Sovereign of that, the adjuster sent a Notice of Dispute Between Insurer form to Sovereign, as well as to Gore Mutual on

February 27, 2015. The accompanying letter made no mention of the earlier acceptance of priority by Mr. Wignarajah.

6. Pembridge subsequently commenced arbitration against Sovereign, Gore, Belair, and Jevco Insurance. Gore, Belair and Jevco were eventually released from the arbitration.

7. A two-day hearing was held, at which counsel for Pembridge and Sovereign tendered evidence and made detailed submissions. Pembridge essentially claims that Ms. Hennessey is not an "insured person" under its policy, and that it should be permitted to withdraw its agreement to accept priority for the claim, which was done in error, and pursue Sovereign for priority. Sovereign does not accept that it is in higher priority to pay the claim, but denies in any event that Pembridge is entitled to withdraw its acceptance of priority.

ISSUES:

The parties set out the following issues in their Arbitration Agreement:

1. Which insurer is responsible to pay Brianna Hennessy ("the Claimant") statutory accident benefits under section 268 of the *Insurance Act* ?

2. If it is determined that the Respondent is liable to pay the Claimant accident benefits under section 268 of the *Act*, what is the amount that is due from the Respondent to the Applicant, as reimbursement for benefits and expenses the Applicant has paid ?

8. The above issues are framed in a very general way. The focus of the parties' submissions at the hearing was on the effect of Pembridge's initial acceptance of priority after receiving a Notice of Dispute from Sovereign, and its subsequent decision to pursue Sovereign for priority under the regulation.

THE EVIDENCE:

9. Both parties filed Document Briefs containing correspondence between the parties, claims notes, and various AB forms and Notices. Transcripts from Examinations Under Oath conducted of Mr. Wignarajah and Irene Kaspryzk, the senior Pembridge adjuster, were also filed.

10. Three witnesses provided *viva voce* evidence at the hearing – Ms. Kaspryzk, Fred Duz and Terri Sullivan, a Senior Claims Examiner and Accident Benefits specialist with Sovereign Insurance. While much time was spent reviewing the many documents relating to the events outlined above, the basic facts underlying this dispute are not really contested. Stripped to a minimum, Sovereign received an OCF 1 form from the Claimant and put Pembridge on notice that it was pursuing them for priority of the claim. Pembridge accepted priority, and then attempted to withdraw its acceptance by sending Sovereign a DBI Notice. The question to be determined is whether Pembridge can pursue Sovereign in these circumstances, or whether its acceptance of priority obliges it to pay benefits to Ms. Hennessey.

The relevant facts can be summarised as follows:

11. Ms. Hennessy was struck by a taxi while crossing the street in the early morning hours of November 10, 2014. She suffered serious injuries and was taken to hospital by ambulance. The accident appears to have triggered two notices from insurance brokers – one from Allan Mann, the Claimant's parents' broker, who sent a Notice of Loss to Pembridge on November 21, 2014, and one from Baird MacGregor, the broker for the taxi company, that was forwarded to Sovereign.

12. These notices caused further steps to be taken. Pembridge assigned Archunah Wignarajah to adjust Ms. Hennessy's claim, and a file was opened in their system on November 24, 2014. Mr. Wignarajah advised at his Examination Under Oath that he had been handling accident benefit claims for approximately six months when he received this assignment. He stated that most of the claims that were assigned to his department

were adjusted within the Minor Injury Guidelines ("MIG") of the *SABS*, and involved payments up to $3,500 in medical/rehabilitation benefits.

13. Mr. Wignarajah stated that all claims received at his office were initially directed to his department, and that the adjusters assigned could request a claim to be transferred to a different department if the exposure to pay was beyond the MIG limits. If a claim potentially involved catastrophic injuries, it would be transferred to a more senior adjuster in the Serious Injury Unit.

14. The Pembridge claims notes indicate that Mr. Wignarajah was assigned to adjust the file on November 24, 2014, and that the file was closed on January 19, 2015. When asked about the steps he took in that two-month period, he stated that he had tried to contact the insured by phone on two occasions and was not able to reach her. He noted that "the number was not in service", although the phone number recorded in his notes differs from that appearing on the broker's notice. He stated that an "AB Application package" was sent out, but was not returned, and explained that the practice at his office was to close a file if no response was received within sixty days of attempted contact.

15. The next entry in the Pembridge claims notes is dated January 31, 2015. It states "Rec'd Notice of dispute from Sovereign General…sending TP insurance a priority acceptance letter". The material filed indicates that Mr. Wignarjah forwarded a letter to Mr. Duz at Claimspro, working on behalf of Sovereign, that states:

> *Dear Fred,*
>
> *Please be advised that Allstate Insurance Company of Canada has agreed to take over the priority for this claimant. Please send us a complete file for Accident Benefits claim and summary of benefits paid to date so that we can reimburse your company accordingly.*
>
> *If you have any further questions, please do not hesitate to contact the undersigned.*
>
> *Sincerely,*
> *Archuna Wignarajah*

Claims Advisor, Accident Benefits

16. The above letter bears the date July 20, 2012, but the parties agree that it was actually received by Claimspro on February 2, 2015.

17. Mr. Wignarajah testified at his EUO that he recalled receiving a phone call from Mr. Duz prior to his acceptance of priority on January 31, during which they briefly reviewed the claim. There are no entries in the log notes to corroborate this recollection. When asked why he had accepted priority on behalf of Pembridge, Mr. Wignarajah explained that he had assumed that Ms. Hennessy, described as the Pembridge insureds' daughter, was a minor, and that he thought that she must therefore be financially dependent on her parents. He acknowledged that the documentation that he had reviewed said nothing to this effect.

18. Mr. Wignarajah's testimony at his EUO was very frank. He stated that this file was the first or second priority dispute that he had encountered, and that he had not received much training in handling priority disputes. He stated that he should not have been the one to respond to Ms. Hennessy's claim, but had ended up doing so. He testified that it was open to him to seek guidance or assistance from his manager or a more senior adjuster on any files that he felt were more complicated or beyond his experience level, but admitted that he had not done so in this case.

19. The transcript of his evidence contains the following admission – "I didn't necessarily know what I was doing and I tried to…respond to it…I thought I knew what I was doing, but I guess I didn't". Mr. Wignarajah explained that he realized that he had made an error in accepting priority on February 13, 2015 when a senior adjuster approached him after she had received a call from a health care provider. This provider had been advised by Sovereign that the file was transferred to Pembridge, and wanted to ensure that Pembridge would pay for the assessment that Mr. Duz had approved. Mr. Wignarajah stated that that was the first time that he understood that the Claimant had sustained serious injuries.

20. As noted above, Sovereign also received a Notice of Loss from its broker shortly after the accident. It retained Claismpro to adjust the claim on its behalf, and the file was assigned to Fred Duz on November 13, 2014. Mr. Duz had worked as an Independent Adjuster with Claimspro for seven years, and had eighteen years of experience handling Accident Benefits claims. He testified that he sent an AB Application package to the Claimant. He subsequently received a call from an Occupational Therapist who had been treating Ms. Hennessey, who advised that the Claimant had traveled back to Ottawa and had been re-admitted to hospital there. She also provided him with a phone number for Norma Hennessy, the Claimant's mother.

21. Mr. Duz spoke to Norma Hennessy on November 25th. She told him about the circumstances of the accident and the injuries sustained by her daughter, Brianna. She advised that Brianna was single, did not own a vehicle, and was employed on a full-time basis as an underwriting manager for a bank. He noted in the log notes that Norma and her husband were insured with Pembridge, but that Brianna was not a listed driver on their policy. Norma also advised him that she had reported the loss to her broker.

22. Mr. Duz testified that he had a "hunch" from the information he received from the Claimant's mother that Brianna was likely not principally dependent for financial support on her parents before the accident.

23. The witness confirmed that an OCF 1 Form / Application for Accident Benefits was submitted to Sovereign on behalf of the Claimant on December 10, 2014. He conducted an AutoPlus search on the Claimant, which confirmed that Ms. Hennessey was not a listed driver on her parents' policy with Pembridge. It revealed, however, that Pembridge had an open *SABS* claim with the same date of loss.

24. Mr. Duz stated that he contacted Pembridge in order to find out whether Pembridge had received an OCF 1 Form from the Claimant before Sovereign had received its Application, as if they had, they would be obligated to respond to the claim. He was advised that Pembridge had an open claims file for this loss, and was provided

with Mr. Wignarajah's contact information. The log notes filed indicate that calls were made by Mr. Duz to Mr. Wignarajah on January 14, 16 and 21, 2015. Messages were left on each occasion requesting a call back, but no return calls were ever received.

25. Mr. Duz testified that he called Pembridge a fourth time on January 28, and was told that Mr Wignarajah was out of the office. He then asked for the office fax number, and prepared a Notice of Dispute Between Insurers (DBI) form directed to Pembridge, The cover letter sent with that form on January 28, 2015 advises that Sovereign received an Application for Benefits from Ms. Hennessey on December 10, 2014 at 12:55 p.m. It then states as follows:

> *We understand that Pembridge Insurance also has on open claim for this loss. It is our understanding that Pembridge…insures Norma and Daniel Hennessy. In the event Pembridge received the Application for Accident Benefits (OCF1) prior to Sovereign General Insurance Company's receipt of it, onus would rest on them to handle this claim for Accident Benefits as first insurer to receive an application.*

26. The same statement is contained in the body of the DBI form. It also states that Sovereign takes the position that Pembridge "may be responsible for payment of Ms. Brianna Hennessey's claim for accident benefits in the event that she is an insured under their policy". Mr. Duz also forwarded DBI Notices to Dominion, Gore Mutual & Jevco. He explained that there was a reference to the latter two insurers having conducted searches on Ms. Hennessey within the past twelve months, and that her brother was insured with Gore Mutual.

27. Mr. Duz testified that he received a letter from Mr. Wignarajah at Pembridge on February 2, 2015, advising that Pembridge agreed to take over priority for Ms. Hennessy's claim. The log notes indicate that Mr. Duz reviewed the letter accepting priority on February 10, 2015, and placed a call to Mr. Wignarajah confirming receipt of the letter on that day. He uploaded the AB file documents through SecureDocs, a protected platform used by insurers to transfer confidential material. He also advised the

other three insurers, as well as the Claimant's treatment providers, that Pembridge had accepted priority for the claim.

28. Mr. Duz testified that he received a call from Mr. Wignarajah a few days later, advising that an Application for Determination of Catastrophic Impairment (OCF 19 form) had been submitted on this file. Mr. Duz advised him that the AB file had been sent to Pembridge, and told him what he knew about the file. He testified that he also explained to Mr. Wignarajah how to download the file from the Secure Docs system.

29. Mr. Duz did not disagree when it was suggested to him in cross-examination that it was rare for an insurer to accept priority for payment of a claim within a few days of receiving a DBI notice. He stated that he continued to work on Ms. Hennessey's claim after Pembridge's acceptance of priority, in case the Claimant chose to object to the transfer of her claim within the fourteen-day period provided in the regulations.

30. The Pembridge log notes indicate that the file was transferred to Irene Kaspryzk, an adjuster in the Serious Injury Unit at Pembridge, on February 13, 2015. Ms. Kaspryzk stated at her EUO that Ms. Hennessy's claim should have been assigned to her initially. She also stated that Mr. Wignarajah had accepted priority without having conducted any investigation. The notes reveal that an email was sent to Mark Potts, the Director of Accident Benefits, on February 13, 2015, once the file was assigned to Ms. Kasprzyk stating –

> *Hi Mark:*
>
> *Just a heads up – we just received this new CAT file were (sic) we appear to have accepted priority from Sovereign and I believe it required further investigation before acceptance. Irene is going to look into this further however, I believe it is too late to reverse – not sure. We have a pedestrian that was struck by Sovereign insured and she has come back to parents policy from what I can tell. She is 30 years of age, lives in her own home in Ottawa and her parents currently reside with her.*
>
> *You can call me if you wish to discuss further.*

Thx,
Marg.

31. Shortly after that, Irene Kaspryzk sent the following note to Mr. Potts –

> *Hi Mark,*
>
> *Spoke with Archuna. He advised me that he does not know why he accepted this priority as there is no documentation (sic)justify acceptance.*
>
> *I have sent an email to Daniel Strigberger to see what we can do about this.*
>
> *I will keep you posted.*
>
> *Irene Kasprzyk*

32. The notes filed indicate that Mr. Potts acknowledged these notes shortly afterwards, and asked that he be advised of the outcome of the expected discussions with counsel "suggesting to the past insurer that this was accepted in error. It's worth a shot and not a new insurer involved".

33. Ms. Kaspryzk testified about the steps she took after being assigned the file. She confirmed that Ms. Hennessey was not a listed driver on the Pembridge policy at the time of the accident. She reviewed the notes in the file from the Case Manager, and noted that the Claimant worked for the Bank of Canada and had recently purchased a home, suggesting that she was not financially dependent on her parents. She did not speak with the Claimant, or obtain a Statutory Declaration or signed statement from her.

34. Ms. Kaspryzk stated that she determined that priority for Brianna's claim should be with Sovereign, as the insurer of the "striking vehicle", given that she was neither listed on the Pembridge policy nor financially dependent on her parents at the time. She decided to send a DBI Notice to Sovereign, and to put Gore Mutual, Jevco and Belair on notice, as had Mr. Duz. She explained that Gore and Jevco had run Autoplus searches on Ms. Hennessey in the prior twelve months, and that Belair was the personal insurer of the taxi driver that struck the Claimant.

35. The notices to Sovereign and to Gore were sent on February 27, 2015. The portion of the letter accompanying the notice relating to Sovereign states that Ms. Hennessey was struck by a taxi insured by Sovereign, and that she had submitted a claim for benefits to them. It makes no reference to the fact that Sovereign had adjusted the claim, sent a priority notice to Pembridge, and that Pembridge had accepted priority. The DBI notice itself similarly makes no reference to Pembridge having earlier accepted priority. In the section titled *Reasons (Why Notice is Given to Other Insurers)*, it states:

> *Pembridge Insurance did not insure Ms. Brianna Hennessy on the above noted date of loss. Ms. Hennessy was not a dependent of her parents. Pembridge Insurance did not receive an Application for Accident Benefits for Ms. Brianna Hennessy as a result of the above noted date of accident. Pembridge first received an Application for Accident Benefits from Sovereign Insurance on behalf of Ms. Brianna Hennessy on January 28, 2015. It is also our understanding that Ms. Hennessy had automobile insurance with Gore Mutual Insurance with her brother Jesse. This letter services as our notice that Sovereign General Insurance Company or Gore Mutual Insurance is responsible for payment of Ms. Brianna Hennessy's claim for accident benefits.*

36. Ms. Kasprzyk testified at the hearing that she sent the DBI notice to Sovereign in order to "retract Archuna's response that we had accepted priority". She stated that his decision to accept priority was an error. She acknowledged in cross-examination that the letter she had sent to Sovereign and to Claimspro makes no reference to the earlier acceptance of priority, but stated that her statement in the letter that Pembridge had not received an Application for benefits was in response to Mr. Duz's earlier correspondence, in which he had asked whether Pembridge had received an OCF1.

37. The witness also admitted that no one at Pembridge had advised Mr. Du at Claimspro or anyone at Sovereign that priority had been accepted in error, and that it was seeking to withdraw that acceptance.

38. Counsel for Pembridge commenced arbitration against Sovereign, Belair, Gore Mutual and Jevco on July 17, 2015. As set out above, all of the Respondents, other than Sovereign, were released from the arbitration prior to the matter proceeding to hearing.

RELEVANT PROVISIONS:

Counsel referred to the provisions below in their submissions –

Ontario Regulation 283/95

> ***2.1*** *(1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010.*
>
> *(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits.*
>
> *(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer.*
>
> *(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits.*
>
> *(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance.*
>
> ***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.*
>
> ***4.*** *(1) An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent.*
>
> ***5.*** *(1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or*

she objects to the transfer of the claim to the insurers referred to in the notice.

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice.

(3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991.

***7.** (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed.*

(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insured person.

(3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3.

PARTIES' ARGUMENTS:

39. Both parties made detailed and thorough submissions at the conclusion of the evidence. I will summarize counsels' main arguments below.

Pembridge's submissions

40. Counsel for Pembridge contended that on a straight priority analysis, it was clear that Sovereign, as the insurer of the vehicle that struck Ms. Hennessey, was in higher priority than Pembridge to pay benefits to her. He noted that Ms. Hennessy was not a listed driver on the Pembridge policy, and submitted that there was no evidence before

me to suggest that she was financially dependent upon her parents. He stated that the real question to be determined is whether Pembridge's earlier acceptance of priority should result in them being saddled with the obligation to pay benefits to Ms. Hennessy for the life of her claim.

41. I note that a dispute arose between counsel in the midst of the hearing about the whether the issue of financial dependency would remain to be determined if Pembridge was permitted to withdraw its acceptance of priority. Mr. Grant noted that one consequence of Pembridge having accepted priority was that Sovereign had ended its investigation into financial dependency shortly after it sent the file to Mr. Wignarajah, and that it was unfair for Pembridge to assert at the hearing that it was clear that Brianna was not dependent upon her parents. Mr. Strigberger objected, and claimed that Sovereign had not disputed Pembridge's assertion that the Claimant was not financially dependent upon her parents, and had effectively conceded that point. I reviewed Sovereign's "pleadings" (the parties had defined the issues and exchanged their positions on them in writing earlier in the process) and ruled that it had not formally conceded this point. I also ruled that if I determined that more evidence was required in order to make a finding on the dependency issue, the hearing would be reconvened for this purpose.

42. Mr. Strigberger submitted that *Regulation 283/95* provides a complete code for priority disputes, and contains technical rules that insurers involved in these disputes must abide by. He noted that sections 3, 4 and 7 of the Regulation make clear that if a party does not meet the time deadlines set out, or the requirement to provide written notice, they are barred from pursuing another party for priority. In contrast, he noted that the Regulation is silent on the consequence of a party accepting priority and later withdrawing that agreement. He argued that the fact that the Regulation does not specifically bar a party who has accepted priority in error from proceeding against another party, as it does in the sections mentioned above, suggests that the legislators did not intend this result.

43. Counsel acknowledged that some arbitrators have addressed the consequences of a party accepting priority and subsequently withdrawing its acceptance, but noted that (at the time this matter was argued) there were no decisions by any court that considered the appropriate sanction in this circumstance. He noted that arbitrators have cited the Court of Appeal's comments in *Kingsway General v. West Wawanosh Insurance* (2002) 58 O.R. (3d) 251 regarding "clarity and certainty of application" being of primary concern in the application of the regulation. He argued, however, that that case addressed a breach of section 3 of the regulation, the penalty for which is specifically provided in the regulation, and submitted that these comments are not applicable to cases relating to the withdrawal of an acceptance of priority, as that is not specifically addressed in *Regulation 283/95*.

44. Mr. Strigberger submitted that instead of barring an insurer who has accepted priority in error from proceeding on the merits, arbitrators should follow the approach that the courts have taken when a first insurer that receives a completed application breaches section 2 of the Regulation, and "deflects" a claim. He noted that the courts have made it clear that in those circumstances an insurer is penalised for that conduct, but is not saddled with paying benefits for the life of the claim, if they are not an "insurer" of the claimant (*Kingsway General Insurance v. Ontario 2007 ONCA 62 (CanLii), Wawanesa Mutual Insurance v. Lombard Canada 2010 ONCA 383 (CanLii), State Farm Mutual Insurance v. TD Home & Auto Insurance 2016 ONSC 6229).* Counsel argued that in the same way, it would be wrong to saddle Pembridge with the obligation to pay benefits in this case, given that the consequence of withdrawing an agreement to accept priority is not spelled out in the regulation.

45. Counsel noted that the 2010 amendments to *Regulation 283/95* addressing the deflection of claims codifies this case law. He noted that section 2.1(7) of the regulation provides that an insurer who breaches that section shall reimburse the other party for legal fees and administrative costs reasonably incurred, rather than requiring them to pay benefits on a permanent basis. He suggested that it would be appropriate for Pembridge

to be sanctioned with the payment of costs or interest in this case, rather than requiring them to pay benefits to Ms. Hennessy for the life of her claim.

46. Mr. Strigberger also pointed to the short time frame within which Pembridge initially accepted priority. He noted that Mr. Wignarajah's letter advising that Pembridge would accept priority, Sovereign's acknowledgement of that acceptance, and the transfer of the Claimant's AB file to Pembridge all took place within the fourteen-day period that is provided to a claimant to object to the transfer of a claim, provided in section 5 of the regulation. He contended that given that a claimant is provided the right to object to the transfer within that period, any "settlement" of the claim reached before the fourteen-day period expires is not valid.

47. Counsel acknowledged that Ms. Hennessy did not object to the proposed transfer of the claim within 14 days. He argued, however, that the language in the regulation is clear, and that parties must wait out the fourteen-day period before any priority "settlements" are reached. He contended that the language in section 5(3) of the regulation suggests that any settlement reached between insurers within that period is not valid, unless the insured person "consents to the agreement or 14 days have passed" since notice was provided. He argued that given that Pembridge's initial acceptance of priority was communicated to Sovereign within five days of the notice having been provided, it was not valid.

48. Mr. Strigberger argued alternatively that if the acceptance communicated by Mr. Wignarajah on February 2, 2015 is interpreted to be a "waiver" of Pembridge's rights to dispute priority, the letter later sent by Irene Kasprzyk on February 27, 2015 was clearly a "retraction" of that waiver. He noted that Mr. Duz testified that it was clear to him when he read that letter that Pembridge was "reneging on its earlier agreement to accept priority". He submitted that this falls within the ambit of the Supreme Court of Canada's ruling in *Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd.* [1994] 2 S.C.R. 490, in which the court stated that waiver can be retracted if reasonable notice is given to the party in whose favour it operates.

49. Finally, counsel for Pembridge submitted in the further alternative that Sovereign should not have initially pursued Pembridge for priority, as it had no reasonable basis on which to claim that priority rested with Pembridge. He pointed out that Mr. Duz had determined that Ms. Hennessey was not a listed driver on the Pembridge policy, and that she was employed on a full-time basis, so was unlikely to be financially dependent on her parents. Counsel contended that Sovereign's hands were therefore "unclean" and that it should not therefore be able to rely on the doctrine of "waiver" to oppose this application.

Sovereign's submissions

50. Counsel for Sovereign submitted that Mr. Wignarajah's quick acceptance of priority must be considered along with the fact that he would have already known some of the basic facts about the loss and priority issues from the documents he had seen and the few steps that he had taken to investigate her claim. Mr. Grant noted that the evidence clearly points to the fact that the claim received by Pembridge should not have been assigned to Mr. Wignarajah, who was only permitted to adjust claims being managed within the Minor Injury Guidelines. He submitted in any event that the investigation he undertook was inadequate, and essentially consisted of making a few phone calls, most of which were directed to the wrong phone number.

51. Counsel contrasted this with the efforts made by Mr. Duz of Claimspro on behalf of Sovereign. He noted that Mr. Duz had various conversations with the Claimant's mother, and obtained information about Brianna's injuries and life circumstances. He was told that she and her husband were insured with Pembridge, and that she had reported the loss to her broker. He submitted that Mr. Duz conducted various Autoplus searches and that when he noticed an entry on the Claimant's parents' search showing that Pembridge had opened a claim under their policy with the same date of loss, it was reasonable for him to believe that the Claimant may have also submitted an OCF 1 Form to Pembridge.

52. Mr. Grant noted that when Mr. Duz called Pembridge in order to clarify that point, he was advised that there was an open AB claim for Ms. Hennessey in their

system, and was given Mr. Wignarajah's name and phone number. He tried to contact him on four occasions, and counsel contended that when he did not receive any response from Mr. Wignarajah after these four attempts, it was reasonable for Mr. Duz to have forwarded a DBI notice to Pembridge. He noted that the regulation does not set out a "standard" that adjusters must meet before sending out a priority notice, but stated that given the facts outlined above, it was appropriate for him to have done so.

53. Mr. Grant cited cases in which arbitrators have determined that parties will only be permitted to withdraw from an agreement to accept priority in situations involving bad faith, or when misleading information has been provided (*TD Home & Auto Insurance v. Markel Insurance, Arbitrator Samis – August 24, 2011, Aviva Insurance v. State Farm Mutual Insurance, Arbitrator Novick – March 2012*). He argued that there is no basis to suggest in this case that Mr. Wignarajah was misled by Sovereign or by Mr. Duz, noting that the log notes filed indicate that the only conversation between these two adjusters took place after Pembridge had accepted priority.

54. Mr. Grant also disputed Pembridge's contention that if it had waived its right to dispute priority, it had retracted its waiver in accordance with the finding in *Saskatchewan River Bungalows, supra.* He contended that the letter forwarded by Mr. Wignarajah on February 2, 2015 was clear, and expressed a clear intention on behalf of Pembridge to waive its right to dispute priority. He noted that whereas estoppel is an equitable remedy, waiver is not, and thus, the "unclean hands" argument relied on by Mr. Strigberger has no application.

55. Mr. Grant acknowledged the cases referred to by Mr. Strigberger regarding the consequences of an insurer's "deflection" of a claim in breach of section 2 of the regulation. He contended, however, that this approach should not be taken as an overriding principle to be applied in all circumstances, and that it is not analogous to the situation in this case.

56. Finally, counsel for Sovereign disputed Pembridge's contention that its acceptance of priority is invalid because it took place before the expiry of the fourteen-day period provided in section 5(3) of the regulation. Mr. Grant noted that subsection 5(3) provides that an insured person who has filed an objection is entitled to participate in the priority dispute, and that any agreement reached between the insurers involved that he or she does not consent to is not binding. He contended, however, that it would be stretching the meaning of the provision unduly to state that in the absence of such an objection, an acceptance of priority that is clearly communicated to the other party within fourteen days of the claimant having received notice of the priority dispute is not valid.

ARGUMENTS & ANALYSIS:

57. While this case took many twists and turns as it wound its way to a hearing, the question I must determine can be simply stated – can an insurer who accepts priority for a claim that it later determines it is not in priority to pay, turn around and pursue the party from which it accepted priority? Should a party in a priority dispute be permitted to shift from "defence" to "offence" as a matter of strategy ?

58. This case also raises the broader question of when a party who accepts priority should be permitted to withdraw that acceptance, and if that is not permitted, what consequences flow from its acceptance.

59. As noted by counsel, arbitrators have grappled with this question before. While some general themes have emerged, a close review of the case law suggests that the findings have been dictated in large part by the underlying facts or circumstances surrounding the acceptances. In some cases, decisions were made by claims adjusters who were less than diligent in their investigation and subsequent acceptance (see *Aviva v State Farm, supra),* while some attempted withdrawals of agreements to accept priority resulted from new information being revealed (see *Motors Insurance v. Co-operators Insurance Company, Arbitrator Jones, August 2004).* At times, misleading or incorrect information was provided (*TD Home & Auto v. Markel Insurance, supra*). A consensus

emerged that insurers who accepted priority should only be permitted to withdraw their acceptance in "extreme situations" such as bad faith or deliberate misrepresentation.

60. I was asked to determine whether an insurer's acceptance of priority could be withdrawn in *Aviva v. State Farm, supra.* The facts in that case are somewhat similar to those here. A claimant was involved in an accident while driving his employer's vehicle, insured by Aviva. He applied to Aviva for benefits and they began paying. Aviva determined that the claimant was a named insured on a policy issued by State Farm, and served them with a Notice of Dispute Between Insurers. About three months after receiving the notice, a State Farm adjuster wrote to Aviva confirming that the claimant was a named insured under that company's policy, and that State Farm would accept priority. When about six weeks had passed and the promised reimbursement cheque had not arrived, the Aviva adjuster called the State Farm adjuster to follow up. He placed her on hold, conferred with his supervisor, and then determined that he had accepted priority in error. He advised the State Farm adjuster that he had inadvertently accepted priority and was withdrawing his acceptance, pending further investigation.

61. At the hearing, counsel for State Farm argued that the adjuster's actions were an "honest mistake", and that insurers in that position should be entitled to withdraw their acceptance. I determined that the adjuster had demonstrated a clear lack of diligence in investigating the priority issue both before and after his purported attempt to withdraw acceptance, and that State Farm should not be entitled to resile from its agreement to accept priority for the claim. I stated – (at p.11)

> *…the system cannot function efficiently if the adjusters fail to investigate at the appropriate time, and then, after advising the first insurer that they accept priority to take over the claim, ask a colleague and change their mind. As (counsel for Aviva) warned, if this is allowed to happen on a regular basis, the system would devolve into chaos.*

62. I also stated that in cases in which parties accept priority based on incorrect information, "the prejudice suffered by each party, if any, should be balanced against the

need for efficiency and expediency in deciding whether a withdrawal of priority should be accepted".

63. This view is consistent with that stated by Arbitrator Samis in *TD v. Markel, supra*, where he stated – (at p.4)

> *I must say that I am in agreement with the tenor of these decisions. I certainly agree with the proposition that insurers who formally take a position about a loss transfer or priority matter, should not be allowed to resile from that position simply because they discover some new fact or circumstance later in the process. It would be most unsatisfactory if insurers could accept responsibility lightly, and then change their position, perhaps repeatedly, with the evolution of their understanding of a case*.

64. The facts in the case before me also fall within the category of an insurer accepting priority after a less than diligent investigation. Ms. Hennessey's file was initially assigned to a junior adjuster at Pembridge with virtually no experience in priority disputes and who was only authorised to manage claims within the MIG. It is not clear whether the broker's loss notice that referenced Ms. Hennessy's serious injuries was inadvertently not forwarded to Mr. Wignarajah (which would likely have caused him to forward the file to the Serious Injury Unit), or whether there was a systemic flaw in the manner in which Pembridge assigned files. However, as the Claimant chose to submit her application for benefits to Sovereign, rather than to Pembridge, the Pembridge claims file was closed.

65. After conducting its investigation, Sovereign decided to pursue Pembridge (among others) for priority. Because he had tried to contact Mr. Wignarajah on three earlier occasions in order to clarify why the Autoplus search indicated that Pembridge had an open claims file, Mr. Duz directed the priority notice to him. In the circumstances, I see nothing improper about Mr. Duz' decision in this regard. He had tried to contact Pembridge on three occasions, in order to determine whether they had received an OCF 1 form before Sovereign had. In view of the information he had compiled to that point, that was not an unreasonable thing to do. And when he did not receive any responses to the

three messages he had left, and with the "ninety-day clock" ticking, his decision to forward a DBI notice was understandable.

66. It is not clear whether Mr. Wignarajah's quick acceptance of priority resulted from his familiarity with the file from his earlier involvement with it, or was due solely to his assumption that as the daughter of Pembridge's insureds, Ms. Hennessy was likely financially dependent upon them. Either way, his lack of investigation stands out, and parallels the "lackadaisical" approach that I determined was fatal to an argument that a mistaken acceptance could be corrected in the *Aviva v. State Farm, supra,* case.

67. It is clear from the claims notes filed that when this mistake was discovered, the senior managers at Pembridge immediately acknowledged that no investigation had been done by Mr. Wignarajah before priority was accepted. The email exchange set out above makes it clear that they wondered whether Mr Wignarajah's acceptance was "too late to reverse – not sure", and that it was "worth a shot" to advise the past insurer that a mistake had been made.

68. As I determined in *Aviva v State Farm*, *supra,* an insurer that attempts to reverse its agreement to accept priority once it is determined that no investigation has been done before accepting should not be permitted to do so. I remain of the view that if insurers were permitted to change their minds or reverse any acceptance of priority communicated in error, priority disputes would be surrounded by uncertainty. The "back and forth" of transferring files between insures could also have a detrimental effect on the adjusting of a claimants' benefits claim and the treatment they require. I acknowledge the tension between efficiency and expediency on the one hand, and the general notion of 'fairness' on the other, but find – as I did in *Dominion of Canada v. RBC Insurance, Wawanesa Mutual Insurance and Motor Vehicle Accident Claims Fund (July 20, 2017)* - that that balance should tip in favour of an efficient system.

69. I find that the above approach is consistent with the Court of Appeal's comments in *Kingsway v West Wawanosh, supra.* Justice Sharpe stated that insurers involved in

priority disputes are sophisticated litigants who deal with the relevant issues and provisions in the regulations on a daily basis, and are entitled to "assume and rely upon the requirement for compliance with those provisions". While those statements were made in the context of a dispute regarding an insurer not complying with a time deadline provided in section 3 of the regulation, I do not accept Pembridge's contention that they should only apply in the context of missed time deadlines. It is worth repeating the Court's statement that –

> *…it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.*

70. I note that Arbitrator Densem took a different view in his decision in *MVACF v Echelon Insurance (August 29, 2017).* While he clearly expressed that insurers should be required to exercise diligence in conducting thorough priority dispute investigations (at pg. 19), he stated that the idea that insurers should only be permitted to withdraw acceptances of priority in instances of bad faith and deliberate has no legal foundation. He opined that the reasoning in *Kingsway v West Wawanosh, supra,* should not be "exported beyond the section of the …regulation with which it was concerned "(section 3), and that the Court's comments regarding certainty and predictability in the operation of the regulation only refer to that provision. He specifically found that there is nothing in either the Superior Court or Court of Appeal's ruling in that case that supports the argument that the legislature intended "to oust the principles of equity and contract law from consideration, if appropriate, in interpreting other sections of the Priority Dispute regulation".

71. I pause to note that in that case, Arbitrator Densem was faced with the question of whether the Fund could withdraw its agreement to accept priority from Echelon, in a situation in which a claimant was injured when she was ejected from a snowmobile that her boyfriend was driving. She applied to Echelon for benefits, because Echelon insured

a car that her boyfriend owned at the time of the loss, and her representatives thought that the snowmobile was uninsured. Echelon put the Fund on notice that it was objecting to its obligation to pay benefits, and claimed that section 268(2) of the Act directed the Fund to pay benefits in circumstances where the claimant had no access to other policies, and the snowmobile was uninsured.

72. It appears that both Echelon and the Fund's adjusters had overlooked the effect of section 2.2.3 of the OAP 1 ("Other Automobiles"), to those circumstances, which extended coverage for Accident Benefits under the Echelon policy to passengers of the snowmobile while driven by her boyfriend. The Fund came to this realisation some eighteen months later, and attempted to withdraw its acceptance of priority. Echelon resisted. Arbitrator Densem determined that the Fund was entitled to withdraw from its agreement to accept priority, and that Echelon was required to reimburse the Fund for benefits it had paid out on the claim.

73. Echelon appealed the Arbitrator's decision to the Superior Court. Justice Lederer upheld the decision but did not endorse all of Arbitrator Densem's findings. He noted Arbitrator Densem's determination that Echelon had failed to undertake the level of investigation mandated by section 3.1 of the regulation, and the requirement that particulars or details of the results of that investigation be provided to the Fund before putting them on notice. Justice Lederer stated that "in the absence of proper notice there was no dispute that could be subject to arbitration", and repeated this finding in different guises throughout the decision.

74. The judge also noted Arbitrator Densem's disagreement with findings in earlier cases that insurers should only be permitted to withdraw agreements to accept priority in situations of bad faith and deliberate misrepresentation. In reference to this, he stated (at para 39) – "the arbitrator did not have to go that far". The comments relevant for our purposes are – (at para.42)

> *By going further the arbitrator has travelled where he did not need to go. The case is not determined by the presence or absence of the right to withdraw for reasons less than bad faith or deliberate misrepresentation. It is because without completing a reasonable investigation there could be no proper notice and no arbitration. The arbitration was void ab initio (invalid from the outset)...**The further considerations of the arbitrator were unnecessary and to some extent misleading. Issues of equity and contract do not arise.***
>
> *(emphasis added)*

75. While Justice Lederman did not elaborate on what part of the analysis he found to be "misleading", it is clear that the above comments do not endorse Arbitrator's Densem's approach to this issue, and that at least in that case, issues of equity and contract should not have been considered.

76. I understand that Echelon is seeking leave to appeal the above decision to the Court of Appeal. I am advised, however, that the grounds of appeal are restricted to the judge's findings with regard to the role of the Fund in priority disputes, and its status as an "insurer". Accordingly, it is not relevant to the issues before me.

77. Mr. Strigberger argues that insurers who accept priority in error should not suffer the "ultimate sacrifice" of assuming the obligation to pay benefits to a claimant for the life of the claim. He notes that it is well accepted that insurers who "deflect" claims presented to them in breach of section 2 of the regulation are not saddled with this obligation (unless they meet the definition of "insurers"), but are rather penalised through the payment of costs. He suggests that a similar approach be taken in cases where insurers accept priority by mistake.

78. I do not accept this argument, on two counts. While the Court of Appeal did find in *Kingsway v. Ontario, supra,* that a party should not be saddled with the permanent obligation to pay benefits if it is not an "insurer" under the regulation, I find that the situation in which an insurer receives an Application for benefits from a claimant that should have been forwarded to a different company to be quite different than that of an insurer who itself makes an error in investigating or accepting priority. The operation of

the accident benefits scheme is premised on the "pay now, dispute later" approach. The court clearly felt that while insurers who ignore this rule should be penalised, it did not find that they should have to pay benefits for the life of a claim, just because a misinformed claimant happened to send an Application their way. The case of an insurer accepting priority after an incomplete or inadequate investigation is different, in the sense that it is the insurer's own mistake that causes the difficulty. In my view, this distinction is sufficient to merit a different result.

79. Further, while the case law on this point has been clear for some time, the idea of penalising an insurer with costs is now codified in section 2.1(7) of *Regulation 283/95*. As there is no parallel provision for an acceptance of priority in error, I find that the analogy does not apply.

80. The Court of Appeal's statement in *Kingsway v West Wawanosh, supra,* is clear – the provisions in *Regulation 283/95* governing priority disputes are precise and specific, and the fact that insurers are sophisticated litigants who address them on a daily basis means that "clarity and certainty are of primary concern" and that "there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases". That is a clear statement from the highest court in the province, about a regulation that is straightforward and focused on procedure. In my view, it follows that when one of those sophisticated litigants makes a clear error because it was simply not diligent enough (or at all, as in this case) in conducting a standard type of investigation, it should pay the price of that error.

81. Pembridge further contends that Mr. Wignarajah's acceptance of priority was not valid, as it was communicated to Mr. Duz and accepted by Sovereign before the fourteen days provided to a claimant to object to a transfer of a claim in section 5 of the regulation had expired. Counsel noted that section 5(3) states that "no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed" since the claimant is provided notice of an agreement between insurers.

82. I do not accept this argument. Firstly, section 5 of the regulation appears for the benefit of claimants, rather than for an insurer who accepts priority in error. It must accordingly be read it in that context. The provision has three parts – subsection (1) provides that a claimant has 14 days to advise the insurer paying benefits that she objects to the proposed transfer of the claim. Subsection (2) states that if the claimant does not do so within the fourteen days allotted, she is not entitled to object to any subsequent agreement reached by the insurers. Subsection (3) then provides that a claimant who has provided notice that she objects to the proposed transfer is entitled to participate as a party in any subsequent proceeding. It also provides that no agreement reached between insurers can be binding unless the claimant consents, or 14 days have passed since written notice of an agreement between insurers is provided to her, and she has not initiated arbitration.

83. There is no dispute that Ms. Hennessey did not file an objection in this case, as she was permitted to do by section 5(1). Subsection 5(3) therefore does not apply to her. Had she filed an objection before Pembridge's acceptance of priority, her consent would have had to have been obtained to her claim being transferred to Pembridge, or the insurers would have had to wait until 14 days had passed after she received notice of that "agreement". The evidence indicates that she was provided notice of Sovereign's intention to dispute its obligation to pay benefits to her on January 28, 2015. If she had filed an objection after the acceptance of priority by Pembridge on February 2, 2015, but within the fourteen days permitted (by February 11, 2015), and she did not consent to the transfer of her claim, Pembridge's acceptance would not have been binding. Again, neither Ms. Hennessey nor her representatives objected to the transfer of the claim. In my view, a straight reading of subsection 5(3) suggests that an objection by a claimant is a pre-condition to its application, and I therefore dismiss Pembridge's argument on this point.

84. My findings above are consistent with the state of the current law regarding an insurer's obligation to provide notice to a claimant pursuant to section 4 of the regulation

that it has sent a notice to another insurer disputing its obligation to pay benefits. The Court of Appeal upheld my decision earlier this year in *Dominion of Canada v. Unifund Assurance Company (*2018) ONCA 303[1] in which I found that notice of a dispute between insurers provided to a Claimant more than two years after it was served on the target insurer, but at a time when the arbitration process was ongoing, did not violate section 4 and did not prevent Dominion from pursuing Unifund for priority. Given the above, a first insurer may provide notice to a claimant at any time from the date that the "target" insurer is put on notice, up to a point in the midst of the arbitration process that may be months or years later.

85. That creates a practical difficulty on the part of an insurer who is being pursued for priority. How will they know when a copy of the DBI notice was forwarded to the claimant, and consequently, when the fourteen - day period for objection to the transfer expires ? Mr. Strigberger contended that a first insurer who is pursuing another insurer for priority should advise that 'target insurer' when it sends a copy of the notice to the claimant, and that both insurers should understand that any settlement or acceptance of priority that occurs less than fourteen days after that is invalid. As set out above, I find that if an acceptance is communicated prior to the expiry of the fourteen-day period, and a claimant objects in a timely way under section 5(1), that acceptance is not binding. If no such objection is filed (as is true in the vast majority of cases), the acceptance of priority should stand.

86. Given my findings above, I will not address the parties' arguments on whether the doctrine of "waiver" applies.

87. For the reason expressed above, I find that Pembridge is not entitled to dispute its obligation to pay benefits to Ms. Hennessey. Its acceptance of priority on February 2, 2015 stands, and its subsequent DBI notice sent to Sovereign on February 27, 2015 is hereby quashed.

[1] Leave application to Supreme Court of Canada pending.

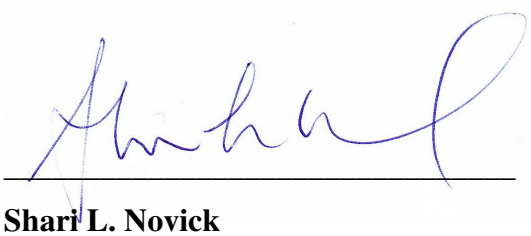
ORDER:

Pembridge is the insurer responsible to pay benefits to Ms. Hennessey under section 268(2) of the *Insurance Act*. Its application for arbitration is hereby dismissed.

COSTS:

Given the result, and subject to any agreement between the parties specifying otherwise, Sovereign is entitled to be paid its legal costs and reasonable disbursements related to its response in this matter, on a partial indemnity basis. If counsel are unable to agree on the quantum of costs payable, I invite them to contact me and a process will be arranged for submissions to be filed.

DATED at TORONTO, ONTARIO this ____9th___DAY OF NOVEMBER, 2018.



Shari L. Novick
Arbitrator