CITATION: Pembridge Insurance Company v. The Sovereign General Insurance Company, 2019 ONSC 7291
COURT FILE NO.: CV-18-00610254-0000
DATE: 20191216

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990 c.I.8, as amended and Ontario Regulations 34/10 and 283/95 thereunder;

AND IN THE MATTER OF THE *Arbitration Act*, S.O. 1991 c. 17, as amended

RE: Pembridge Insurance Company, Applicant (Appellant in Appeal)

AND:

The Sovereign General Insurance Company, Respondent (Respondent in Appeal)

BEFORE: Kimmel J.

COUNSEL: *Daniel Strigberger*, for the Applicant, Appellant in Appeal, Pembridge Insurance Company

Cameron Grant, for the Respondent, Respondent in Appeal, The Sovereign General Insurance Company

HEARD: July 15, 2019

ENDORSEMENT AND REASONS FOR DECISION
(APPEAL FROM ARBITRATION DECISION REGARDING RESPONSIBILITY FOR PAYMENT OF STATUTORY ACCIDENT BENEFITS)

The Appeal

[1] Pembridge Insurance Company appeals from the award of Arbitrator Shari Novick dated November 9, 2018, pursuant to which Pembridge was found to be the insurer responsible to pay statutory accident benefits to Ms. Brianna Hennessy as a result of having agreed to take over the priority for her claims.

[2] Pembridge argues that the arbitrator erred in deciding that it was the insurer responsible to pay the accident benefits without having regard to the priority scheme prescribed under s. 268(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 for determining who is liable to pay statutory accident benefits. Pembridge maintains that it was entitled to dispute its obligation to pay Ms. Hennessy under O. Reg. 283/95 s.1, having complied with all of the prescribed requirements for raising a dispute and making an application for arbitration and there being no express prohibition in the regulations against an insurer that has agreed to accept priority later disputing its obligation to do so.

[3] The Sovereign General Insurance Company seeks to uphold the arbitrator's findings that:

(i) when Pembridge accepted priority on February 2, 2015 an agreement was formed that could not be unilaterally withdrawn; and

(ii) the existence of that agreement provided a sufficient basis on which to find that Pembridge was the insurer responsible to pay the accident benefits.

[4] For the reasons that follow, the appeal is dismissed. The arbitrator's findings were reasonable. Those findings were based on her assessment of the facts and the application of well-established arbitral jurisprudence in this area concerning the binding effect of an insurer's acceptance of priority, absent exceptional circumstances that do not exist in this case. Her dismissal of Pembridge's application for arbitration reasonably flows from that finding. Her determination of the broader issue submitted to arbitration by the parties under the *Arbitration Act, 1991,* S.O., 1991, c.17, that Pembridge is the insurer responsible to pay benefits to Ms. Hennessy, also reasonably flows from her finding that Pembridge was not entitled to withdraw its agreement to accept priority.

Background

[5] Ms. Hennessy suffered extensive injuries after being struck while crossing the street on November 10, 2014 by a taxi. Sovereign insured the vehicle that struck Ms. Hennessy. Ms. Hennessy submitted a claim for statutory accident benefits to Sovereign that was received on December 10, 2014. Sovereign sent a notice indicating that Pembridge may be an insurer responsible for payment of Ms. Hennessy's claims by letter dated January 28, 2015. Pembridge was the insurer of Ms. Hennessy's parents' car, which was not involved in the accident.

[6] Pembridge's adjuster assumed that Ms. Hennessy was a dependent and thus an insured under its policy when it agreed to take over the priority for her claims by letter sent to Sovereign on February 2, 2015. Ms. Hennessy's accident benefits file was thereafter transferred to Pembridge on February 10, 2015. Ms. Hennessy did not object to the Sovereign notice or file transfer. Pembridge has been paying Ms. Hennessy's statutory accident benefits since then. After receiving the file, Pembridge realized it may have accepted priority in error. On February 27, 2015, Pembridge sent a new notice that either Sovereign or Gore Mutual Insurance (the insurer of Ms. Hennessy's brother's car which was not involved in the accident)[1] was responsible for her claim for accident benefits. Ms. Hennessy did not object to this notice either.

The Arbitration Pleadings and Agreement to Arbitrate

[7] Pembridge delivered a notice of dispute and demand for arbitration that was stated to be made pursuant to s. 7 of the *Insurance Act* regulation and the *Arbitration Act, 1991.* In its Statement of Issues dated June 25, 2017 Pembridge denied that Ms. Hennessy was an insured person under her parents' insurance policy with Pembridge and asserted that its February 2, 2015 communication was not a bar to it disputing priority against Sovereign. Pembridge claimed to be

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[1] The Notice of Arbitration initially named Gore and two other insurance companies, as well as Sovereign, as respondents, but the arbitration only proceeded against Sovereign.

entitled to dispute its priority obligation and to initiate an arbitration under s. 7 of the regulation because, even though it was not the first insurer to receive a completed application for benefits from Ms. Hennessy, it was an "other insurer against whom the obligation to pay benefits [was] claimed."

[8] Sovereign's Response dated July 3, 2017 denied Pembridge's standing to initiate the arbitration since the matter had been settled by Pembridge's acceptance of priority for Ms. Hennessy's claims and there was thus an agreement among the insurers about who was required to pay benefits. Although Sovereign's position was that Pembridge was not entitled to initiate an arbitration under s. 7 of the regulation because the threshold requirement that "the insurers cannot agree as to who is required to pay benefits" was not satisfied and thus Pembridge's notice and demand delivered pursuant to the regulation could not give an arbitrator jurisdiction, Sovereign stated that it was willing to jointly appoint an arbitrator with Pembridge to resolve the underlying dispute by agreement to arbitrate pursuant to the *Arbitration Act, 1991.*

[9] Sovereign raised various other arguments in its Response, including that Pembridge was not entitled to revoke its acceptance of priority, waiver and estoppel. In its Reply dated October 3, 2017, Pembridge asserted various arguments as to why there could be no binding agreement of priority and replied to the other arguments of waiver and estoppel.

[10] The arbitration agreement between the parties dated February 12, 2018 specified the issues that the parties agreed to submit to arbitration pursuant to s. 268 of the *Insurance Act*, O. Reg. 283/95, and the *Arbitration Act, 1991* to include:

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

[11] Under the arbitration agreement, the parties agreed to appoint Shari Novick as arbitrator pursuant to the *Arbitration Act, 1991*. They also reserved for themselves a right of appeal to this court on issues of law or mixed fact and law and specified the standard of review on appeal to be correctness on issues of law and reasonableness on issues of fact and law.

The Arbitrator's Decision

[12] The arbitrator observed (at paras. 7-8 of her decision) that, within the broadly framed issue of which insurer is responsible to pay the Claimant statutory accident benefits under s. 268 of the *Insurance Act*, the two-day hearing was focussed on Pembridge's initial acceptance of priority after receiving the Notice of Dispute from Sovereign, and its subsequent decision to pursue Sovereign for priority under the regulation.

[13] She found (at paras. 10 and 36-37 of her decision) that the basic underlying and uncontested facts were that:

a. Sovereign received an OCF 1 form from the Claimant and put Pembridge on notice that it was pursing Pembridge for priority of the claim.

b. Pembridge agreed to accept priority for Ms. Hennessy's claim.

c. Pembridge subsequently sent Sovereign a DBI Notice that it was pursuing Sovereign for priority of Ms. Hennessy's claim.

d. Although there was no direct advice at the time of Pembridge's DBI Notice that priority had been accepted in error or that Pembridge was seeking to withdraw that acceptance, it later became apparent that was Pembridge's position.

[14] This factual context led to the identification of threshold questions to be determined within the broadly framed issue of which insurer was responsible to pay Ms. Hennessy's accident benefits, namely: whether an insurer who accepts priority for a claim that it later determines it is not in priority to pay can pursue the party from which it accepted priority? And the related question of whether a party who accepts priority should be permitted to withdraw that acceptance, and if not permitted to do so, what consequences flow from its acceptance?

[15] Having regard to a line of prior decisions of arbitrators dealing with attempts by insurers to withdraw agreements to accept priority resulting from either a less than diligent initial investigation or new information being revealed, the arbitrator observed (at para. 59 of her reasons) that "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."

[16] This case was found by the arbitrator (at paras. 66-67 of her reasons) to fall into the first category of a lack of diligent (or any) investigation on the part of Pembridge into its initial assumption that Ms. Hennessy was financially dependent on her parents. Relying on this line of arbitration decisions and the policy favouring certainty and efficiency in the handling of priority disputes, the arbitrator went on to find that, in these circumstances of lack of diligence and in the absence of extenuating or extreme circumstances, the insurer attempting to reverse its agreement to accept priority (Pembridge) should not be permitted to do so (at para. 69 of her reasons).

[17] Pembridge urged the arbitrator to avoid an outcome that could lead to it having to pay benefits for the life of Ms. Hennessy's claim that it would not have otherwise been responsible for under the priority scheme of the regulation. The arbitrator did not accept the analogy urged upon her to cases in which insurers who deflected claims presented to them in breach of s. 2 of the regulation were ordered to pay costs but not saddled with the responsibility for to pay benefits for the life of a claim that they would not have otherwise been responsible for. The arbitrator distinguished those cases because they arose as a result of the claimants having initially approached an insurer who did not expect to be found to have ultimate priority (and who thus "deflected" their initial application to another insurer to avoid having to pay the benefits pending the determination of priority). There was nothing about the insurers' conduct in those cases that could be said to be an agreement to accept priority. Rather, the issue and policy considerations turned on the question of what consequence should flow from their failure to comply with the regulation.

[18] The arbitrator also considered the timing of the binding effect of Pembridge's agreement to accept priority. Although Ms. Hennessy had 14 days in which to file an objection to the notice of dispute, in which case her consent under s. 5(3) of the regulation would have been required as a condition of Pembridge's agreement to accept priority, she did not object. The arbitrator found

(at paras. 83, 85 and 87 of her reasons) that, if Ms. Hennessy had objected and then did not consent to the transfer of the claim, Pembridge's acceptance would not have been binding, but since that did not occur, Pembridge's acceptance of priority on February 2, 2015 stands. The fact that Pembridge communicated its agreement to accept priority before the expiry of the 14-day objection period did not render its agreement to accept priority invalid.

[19] On the threshold questions, the arbitrator concluded that an insurer who accepts priority for a claim that it later determines it is not in priority to pay cannot pursue the party from which it accepted priority absent circumstances in which it would be permitted to withdraw its agreement to accept priority. As a consequence, the arbitrator quashed Pembridge's DBI notice sent to Sovereign under the regulation on February 27, 2015 and dismissed its application for arbitration.

[20] In addressing the broader issue that the parties submitted to arbitration pursuant to the *Arbitration Act, 1991* the arbitrator determined that a further consequence of Pembridge's acceptance of priority is that Pembridge is the insurer responsible to pay benefits to Ms. Hennessy.

Standard of Review on Appeal

[21] The parties agree that, under the current state of the law, the presumptive standard of review applicable to arbitration decisions made in the context of priority disputes is reasonableness, even on questions of law (and notwithstanding that their arbitration agreement says questions of law will be reviewed on a standard of correctness), except on questions of jurisdiction, constitutional questions, or questions of general or systemic importance and outside of the adjudicator's specialized area of expertise. See *Ontario (Minister of Finance) v. Echelon General Insurance Company*, 2018 ONSC 4550, 295 A.C.W.S. (3d) 847, at paras. 7-8, citing *Intact Insurance Co. v. Allstate Insurance Co. of Canada*, 2016 ONCA 609, 351 O.A.C. 1, and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.[2] See also *The Dominion of Canada General Insurance Company v. Unifund Assurance Company*, 2018 ONCA 303, 290 A.C.W.S. (3d) 681, at paras. 3 and 24-38.

Relevant Provisions of the *Insurance Act* and Regulations

[22] Disputes Between Insurers, O. Reg. 283/95 under the *Insurance Act*, governs the procedures to be followed by insurers in a statutory accident benefits priority dispute. The relevant sections of the regulation are as follows:

> 2.1(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.
> ...

[2] At the time of argument of this appeal, a trilogy of cases had been argued in the Supreme Court of Canada concerning the appropriate standard of review and that decision remains under reserve. In the intervening time since argument of this appeal, the Court of Appeal for Ontario released its decision dismissing the appeal in *Echelon*, at 2019 ONCA 629, 147 O.R. (3d) 1. The Court of Appeal confirmed in that case that the standard of review for a question of law determined by an arbitrator in the statutory accident benefits regime is presumptively reasonableness (at para. 10).

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

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

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

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

(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7.

...

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. [the approved form is in the form of the DBI Notice].

...

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.*

6. (1) The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act.

(2) Upon request by the first insurer that receives a completed application for benefits, the insured person shall submit to one examination under oath for the

purpose of determining who is required to pay benefits under section 268 of the Act.

...

(4) The scope of the examination under oath is limited to matters that are relevant to determining who is required to pay benefits under section 268 of the Act.

...

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.

[23] The applicable subsection 268(2) 2 of the *Insurance Act* in respect of non-occupants sets out the priority to pay as among potential insurers to be as follows:

Liability to pay

2. In respect of non-occupants,
i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).
Liability
(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Analysis

[24] The broad question on this appeal is whether the arbitrator erred in finding that Pembridge was the insurer responsible to pay accident benefits to Ms. Hennessy. The appeal raises the following subsidiary issues for consideration:

a. Was the arbitrator's finding that Pembridge agreed to accept priority reasonable?

b. Was the arbitrator's finding that Pembridge could not withdraw its acceptance of priority reasonable?

c. Was it reasonable for the arbitrator to conclude that the effect of an irrevocable acceptance of priority was to preclude Pembridge from disputing its priority and from initiating an arbitration under s. 7 of the regulation?

d. Was it reasonable for the arbitrator to make a finding that Pembridge was the insurer responsible to pay accident benefits to Ms. Hennessy?

e. Do the estoppel and waiver arguments need to be adjudicated?

A. Was the arbitrator's finding that Pembridge agreed to accept priority reasonable?

[25] Pembridge raises two arguments against any finding that it agreed to accept priority.[3]

[26] Pembridge first argues that the arbitrator erred in that she did not actually make a finding that there was an agreement, but rather simply referred throughout her reasons to Pembridge's agreement to accept priority. It further argues that there could be no finding of an agreement to accept priority in the most basic sense in the absence of an offer, acceptance, or consideration. Pembridge contends that the *pro forma* notice (to Ms. Hennessy and copied to Pembridge and other insurers) and Pembridge's response to that notice cannot be taken to constitute an agreement.

[27] I find that argument to be uncompelling. Reading the regulation as a whole and in the context of the *Insurance Act* and its priority scheme, it is contemplated that there will in most cases be an agreement between the insurers on the question of priority and it is in the context of the notice and response that it would most logically arise. In Pembridge's own words in its letter sent to Sovereign on February 2, 2015 in response to the notice from Sovereign that it may be responsible for payment of Ms. Hennessy's claims, Pembridge unequivocally stated that it agreed to take over priority for her claims and asked that the complete file be sent along with a summary of benefits paid to date so that they could be reimbursed. Pembridge's agreement to accept priority was further confirmed in writing by Sovereign when the file was sent to Pembridge. In furtherance of the priority agreement, Pembridge acquired the right to examine Ms. Hennessey under oath pursuant to s. 6(2) of the regulation and to compel certain information from her, which rights

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[3] Pembridge's other argument, that any priority agreement was invalid by reason of Sovereign's misconduct for having acted in bad faith or misled Pembridge, was not pursued by Pembridge on the appeal. This argument was not made out on the record, which demonstrated many efforts by Sovereign to contact Pembridge before it issued its dispute notice

Pembridge does not dispute it had acquiresd but chose not to pursue. This was part of the consideration for Pembridge's agreement to accept priority that flowed from the operation of the statutory regime.

[28] The arbitrator clearly found that there was an agreement by Pembridge to accept priority for Ms. Hennessy's claim and that finding was supported by the evidence when considered in the context of the statutory scheme. Pembridge did not deny that agreement or advise that it was seeking to withdraw or resile from that agreement until months later, in the context of its attempt to initiate a dispute and arbitration of its own.

[29] Pembridge's second argument against the finding of a binding agreement is equally uncompelling. It is based on the contention that the agreement is a nullity because it was entered into within the 14-day period that Ms. Hennessy could have objected to the notice from Sovereign that triggered Pembridge's acceptance of priority. If she had objected, under s. 5 of the regulation, the agreement would not be binding without her consent.

[30] The arbitrator's finding that the prospect of a subsequent objection within the 14-day period does not invalidate Pembridge's agreement to accept priority but rather renders it voidable is consistent with the statutory scheme. On a plain reading of s. 5 of the regulation, it is for the protection of claimants. No reason was proffered by Pembridge for reading it in a manner that would interfere with the normal course dealings between insurers and it makes express provision for what happens in the event of an objection from the claimant. There is nothing in the regulation that says that insurers can only reach agreement on priority after the 14-day period for the claimant to object has elapsed, and no policy or other reason for imposing such a restriction has been identified.

[31] The arbitrator's finding that Pembridge agreed to accept priority was reasonable.

B. Was the arbitrator's finding that Pembridge could not withdraw its acceptance of priority reasonable?

[32] The arbitrator's finding that it was not open to Pembridge to withdraw or resile from its acceptance of priority was made having regard to a line of arbitral jurisprudence that supported this conclusion.

[33] Pembridge argues that the line of cases (some of which this arbitrator herself decided) have been wrongly decided, have not been directly considered by the court and should not be upheld by this court. I note that the appeal judge in *Echelon* had the opportunity to consider and reject on a broader level this line of arbitral jurisprudence, but instead he distinguished them in that case, where the "insurer" on one side of the dispute was the Motor Vehicle Accident Claims Fund to which different policy considerations apply.

[34] It is Pembridge's contention that, in the absence of express language in the regulation that an insurer cannot withdraw an agreement to accept priority, the arbitrator (and the court) should not read into the regulation a prohibition against withdrawing from such an agreement. I do not read these cases (or the arbitrator) to have imposed an absolute prohibition against the withdrawal of an agreement to accept priority. They allow for exceptions and recognize that each case must be determined on its own facts. See, for example, *Aviva Insurance Company of Canada v. State*

Farm Insurance Company (2012), 2012 CarswellOnt 17684 (Arbitrator: Shari L. Novick, at pages 11-12).

[35] This line of cases gives effect to the policy considerations identified by the Court of Appeal in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.*, [2002] 58 O.R. (3d) 251 (C.A.), at para. 10, that "clarity and certainty of application are of primary concern."

[36] The rationale for the application of this policy in the context of rescission of priority agreements was aptly summarized by Arbitrator Lee Samis in 2011 (at para. 28 of his decision in *TD Home & Auto Insurance Company v. Markel Insurance* (2011), 2011 CarswellOnt 19160):

> ...[I] nsurers who formally take a position about a loss transfer or a priority matter, should not be allowed to resile 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.

[37] Other decisions of arbitrators in this specialized area, including arbitrator Novick, have focussed on this same policy objective of simplicity and efficiency in concluding that insurers should only be permitted to withdraw from priority agreements in limited circumstances. See, for example, *Dominion of Canada v. RBC Insurance* (2017), 2017 CarswellOnt 19966 (Arbitrator: Shari L. Novick), *Aviva Insurance Company of Canada v. State Farm Insurance Company* (2012), 2012 CarswellOnt 17684 (Arbitrator: Shari L. Novick), *Motors v. Co-Operators* (2004), 2004 CarswellOnt 11270 (Arbitrator: Guy Jones) and *Enterprise Rent a Car v. ING Insurance Company of Canada* (2006), 2006 CarswellOnt 11716 (Arbitrator: Guy Jones).

[38] Pembridge re-argued on appeal that this line of arbitral jurisprudence should be set aside and the court should endorse instead, by analogy, a cost (or some equivalent) penalty-approach such as has been taken with insurer "deflectors"[4] to strike a balance that avoids an insurer who accepts priority in error and who would not otherwise be the priority insurer under the priority scheme being saddled with having to pay the accident benefits for the life of the claim. The arbitrator did not consider those cases to be analogous to this one. The arbitrator's assessment of this argument and determination that it was not applicable to this situation was reasonable. The conduct at issue in those other cases had no bearing on the priority determination but was concerned with the initial responsibility for funding claims for benefits pending that determination. It is reasonable to expect that the policy underlying the legislation will be given effect in different ways under different circumstances.

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[4] For example, to cases like *Kingsway General Insurance Company v. Ontario*, 2007 ONCA 62, 84 O.R. (3d) 507, where an insurer, in breach of s. 2 of the regulation, orchestrated a deflection of the claimant's first request for payment of benefits to another insurer (or the Motor Vehicle Accident Claims Fund being treated for this purpose as an insurer) to avoid the initial obligation to pay. In those cases, while the first insurer was found to have breached the regulation, the result was not to require them to pay statutory accident benefits that they would otherwise not have had the priority to pay having regard to s. 268 of the *Insurance Act*, but rather to penalize them with costs for interfering with the efficient operation of the intended scheme under the legislation.

[39] The decisions dealing with the ability of an insurer to withdraw or resile from an acceptance of priority have been made by arbitrators under their home statute and I am not persuaded that they are unreasonable or that they should be rejected in favour of the alternative that Pembridge proposes, which could create the unsatisfactory situation identified in *TD Home & Auto*, that "...insurers could accept responsibility and then change their position, perhaps repeatedly, with the evolution of the understanding of their case."

[40] The arbitrator's reliance on the well-established line of cases dealing with attempts to withdraw or resile from priority agreements was reasonable, having regard to the words of the regulation and the policy or purpose underlying it. That underlying policy supported the application of these authorities to this case in which there were no exceptional circumstances, just a mistaken assumption by Pembridge that Ms. Hennessy was dependent on her parents and a failure to communicate internally within Pembridge that she had suffered extensive injuries.

C. Was it reasonable for the arbitrator to conclude that the effect of an irrevocable acceptance of priority was to preclude Pembridge from disputing its priority and from initiating an arbitration under section 7 of the regulation?

[41] Having concluded that there was an agreement by Pembridge to accept priority for Ms. Hennessy's claims and that it was not entitled to withdraw or resile from that agreement, the arbitrator considered what the effect of that was on the ability of Pembridge to deliver a dispute notice and initiate an arbitration under s. 7 of the regulation, and she concluded that this disentitled Pembridge from doing so. She quashed the DBI notice sent by Pembridge on February 27, 2015 and dismissed Pembridge's application for arbitration at paragraph 87 of her reasons. While it may have been redundant for the arbitrator to both quash the DBI notice and dismiss Pembridge's application for arbitration, the underlying logic supports either, or both, of these outcomes.

[42] This outcome was reasonable and logically flows from the plain reading of s. 268 of the *Insurance Act,* s. 1 of the regulation that requires all disputes between insurers about who is required to pay benefits to be resolved in accordance with the regulation, and s. 7 of the regulation which provides only one mechanism for insurers to initiate an arbitration that is predicated on a threshold requirement that the insurers cannot agree on priority. It reads as follows:

> 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.

[43] Pembridge argues that there is a difference between insurers who cannot agree and insurers who have not agreed, and that by necessary implication, if there is an arbitration under s. 7 of the regulation, they cannot agree. However, it is clear from the lead up to the arbitration that Sovereign never "agreed" that s. 7 of the regulation had been properly invoked by Pembridge and it was clear that it was agreeing to an arbitration under the *Arbitration Act, 1991*. Nor do I see the logic of the distinction Pembridge seeks to draw that would permit an insurer who has agreed to accept priority to pay benefits to precipitate a disagreement about who is required to pay benefits and initiate an arbitration under s. 7 of the regulation. The arbitrator's conclusion that Pembridge's agreement to accept priority for Ms. Hennessy's claim precluded it from sending a dispute notice is reasonable,

although its invalidity also depended on her conclusion that the priority agreement could not be withdrawn in the circumstances of this case. The arbitrator's decision to dismiss Pembridge's application for arbitration under the regulation also reasonably flows from her finding that the priority agreement was binding.

[44] A secondary argument was also raised by Sovereign, that since Pembridge was not paying benefits under s. 2 or 2.1 of the regulation (because it was not the first insurer to receive a completed application for benefits) and it was not an insurer against whom the obligation to pay benefits was claimed, that too rendered it unable to initiate an arbitration under s. 7 of the regulation.

[45] Pembridge argued on appeal that it became an insurer against whom the obligation to pay benefits was claimed when the accident benefits file was transferred to it without any objection from the claimant Ms. Hennessy. In light of the finding on the primary argument, the arbitrator did not deal with this secondary argument. Since I have found her determination on the primary argument to be reasonable, I also do not need to decide this secondary question of Pembridge's standing to initiate this arbitration.

D. Was it reasonable for the arbitrator to make a finding that Pembridge was the insurer responsible to pay accident benefits to Ms. Hennessy?

[46] Pembridge argues that the arbitrator erred and that it was not reasonable for her to make a finding on the broad question that the parties submitted to arbitration, that it was the insurer responsible to pay accident benefits to Ms. Hennessy, without addressing the merits of the criteria under s. 268(2)2. of the *Insurance Act* that determine that priority. Pembridge contends that it would only have priority under s. 268(2)2.1 if it was determined that Ms. Hennessy was an insured person under its policy of insurance covering the automobile of her parents, which in turn would only be the case if she was found to be a dependent of her parents at the time of the accident.

[47] Pembridge argues that unless recovery against Pembridge is established under the statutory priority scheme, as a non-occupant Ms. Hennessey's recourse is against the insurer of the automobile that struck her, namely Sovereign, pursuant to s. 268(2)2.ii.

[48] The arbitrator, despite having dismissed Pembridge's application for arbitration under s. 7 of the regulation, had the jurisdiction to decide this question by virtue of the parties' agreement to submit this question to arbitration not only pursuant to s. 268 of the *Insurance Act* and its regulations but also pursuant to the *Arbitration Act, 1991*.

[49] It reasonably flows from the arbitrator's finding that Pembridge agreed to accept priority that, by virtue of that agreement, Pembridge is the insurer with responsibility to pay accident benefits to Ms. Hennessy. Pembridge's agreement to accept priority in the context of the scheme of the *Insurance Act* renders Ms. Hennessy to be an insured person under Pembridge's policy of insurance and there was no need for a specific finding that she was a dependent of her parents at the time of the accident.

[50] It would be neither efficient nor logical to require the arbitrator to undertake the traditional s. 268 priority analysis on the merits after concluding that there was a binding agreement to accept priority by one insurer. While arguments were made by Pembridge based upon cases that are said to establish a principle that an insurance company should not be saddled with an accident benefits file permanently unless it would be the responsible insurer under the statutory scheme (discussed above, for example, *Kingsway v. Ontario*), they are not analogous in that they were not cases of insurers who have accepted priority, about which there is already an established line of arbitral jurisprudence that says that acceptance of priority is a justification for an insurer being saddled with the burden of the accident benefits file permanently.

[51] In any event, in the absence of an order by the arbitrator that Sovereign is the responsible insurer (which the arbitrator was not prepared to make in light of Pembridge's agreement to accept priority), Pembridge would, by default, be required to continue to pay the statutory accident benefits to Ms. Hennessy as it has been doing since 2015. This was not a "giant leap" in reasoning by the arbitrator, as Pembridge contends. Rather it is the result of Pembridge's agreement to accept priority. Pembridge itself acknowledged in its written submissions that priority equals responsibility to pay.

E. Do the estoppel and waiver arguments need to be adjudicated?

[52] The written submissions of the parties addressed the issues of waiver and estoppel, but they were not pursued in oral argument. Sovereign correctly pointed out that the arbitrator did not deal with these issues and the evidence relating to them was not before the court. The parties sought directions as to how, by whom and when the arguments pertaining to waiver and estoppel should be dealt with if the appeal was allowed. They agreed that there would be no need to deal with them if the appeal is dismissed. Accordingly, there is not need for me to deal with these arguments.

Disposition and Costs

[53] The arbitrator's core finding that Pembridge was not entitled to withdraw its agreement to accept priority, and that the priority agreement thus remains in effect, was reasonable. I also find that her conclusion, that the consequence of that agreement is that Pembridge is the insurer responsible to pay benefits to Ms. Hennessy under s. 268(2) of the *Insurance Act*, reasonably flows from her core finding, and that she had the jurisdiction to make such a finding. This was one of the specific questions that the parties agreed to arbitrate under their arbitration agreement and the *Arbitration Act, 1991*. In reaching her conclusions, the arbitrator considered the relevant sections of the *Insurance Act* and the regulation, the statutory and regulatory context as a whole, the interests and policy objectives intended to be advanced and protected as well as the positions of the insurers involved in this dispute. The appeal by Pembridge is dismissed.

[54] Counsel advised at the hearing that it was agreed that the losing party would pay costs to the winning party on the appeal in the all-inclusive amount of $10,000.00 and I therefore order Pembridge to forthwith pay Sovereign its costs of this appeal fixed in the amount of $10,000.00 inclusive of all fees, disbursements and taxes.

Kimmel J.

Date: December 16, 2019