IN THE MATTER OF The ***Insurance Act*, R.S.O. 1990, c. 1.8, as amended**

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

and

AXA INSURANCE

Respondent

AWARD

Heard: August 28, 2013

Counsel:

Kevin D. H. Mitchell for the Applicant, Wawanesa Mutual Insurance Company

Thomas Hughes for the Respondent, AXA Insurance

SCOTT W. DENSEM: ARBITRATOR

Introduction:

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute concerning which of the insurers have priority under Section 268 of the Insurance Act for the payment of *Statutory Accident Benefits* (SABS) to Preadeep Rampersaud ("the claimant").

In November, 2010, the Applicant ("Wawanesa") sought an interim Order for a determination as to whether it or the Respondent ("AXA") had the obligation to pay SABS to the claimant. At the time the motion was brought the claimant's representative had not yet advanced a specific monetary claim for SABS.

I released an interim decision on May 31, 2011 concluding that as between Wawanesa and AXA, AXA had the obligation to deal with the claimant's SABS claim.

AXA subsequently handled the claimant's SABS claim. Wawanesa's written submissions for this hearing contained the Settlement Disclosure Notice confirming the details of the terms upon which AXA settled the claimant's SABS claim for $40,000. The written submissions indicate that a further $19,615.86 was paid in addition to the lump sum settlement. Based on this information, the quantum of concern for the priority dispute would appear to be approximately $60,000.

This Award is the final arbitration disposition of the priority issue between Wawanesa and AXA.

Evidence

At the August 28, 2013 hearing, in addition to oral submissions, the parties relied upon the documents which had been submitted to me for the interim motion brought by Wawanesa, and they supplemented those documents with additional written submissions. I have set out below the salient documents submitted to me by the parties which form the basis of my findings of fact, and constitute the written arguments of the parties.

1. Arbitration Agreement, executed December 12, 2012, and January 10, 2013.

2. Factum of the Moving Party, the Applicant (Wawanesa), November 10, 2010.

3. Submissions of the Applicant (Wawanesa), July 29, 2013.

4. Factum and Book of Authorities of the Respondent (AXA), undated, submitted for the interim motion heard November 18, 2010.

5. Factum and Book of Authorities of the Respondent (AXA), undated, submitted for the arbitration hearing August 28, 2013.

6. Reply of the Respondent (AXA), August 13, 2013.

7. Affidavit of John Bradbury and Exhibits A-N thereto, sworn November 10, 2010, submitted by Wawanesa.

9. Affidavit of Michael Barneveld and Exhibits A-P thereto, sworn November 15, 2010, submitted by AXA.

10. Mercury General Corporation's SEC filings for the fiscal year ended December 31, 2009, submitted by AXA.

Issues

The issues, paraphrased from the Arbitration Agreement are as follows:

(a) As between Wawanesa and AXA, which insurer is responsible to pay SABS to the claimant arising out of a motor vehicle accident occurring on December 13, 2009?

(b) What indemnity amount is to be paid to the successful party, if any?

(c) What is the amount of interest owing upon the amount determined in respect of issue (b), if any?

(d) Is Wawanesa entitled to its costs related to its Superior Court Application to appoint an arbitrator? Otherwise, what is the scale and quantum of costs and which party has the burden of payment?

I will recite a summary of the facts relevant to the issues to be decided. Except where I have otherwise indicated, this summary of the facts is based on those findings I made in my May 31, 2011 decision on the interim motion not challenged by the parties at the arbitration hearing, and the aforementioned evidence submitted in the arbitration.

The claimant was involved in an accident on December 13, 2009. He was an occupant of a 1997 GMC vehicle. His vehicle was struck by a vehicle insured by AXA under policy number PER003942586.[1]

[1] Barneveld Affidavit, paragraphs 2,3

At the time of accident the claimant was a named insured under two policies of Insurance. He was a named insured on a policy covering the vehicle in which he was an occupant. That vehicle was insured under policy number 090105005416610 issued by the Mercury Insurance Company of Florida ("Mercury"). The claimant appears as a named insured on the declarations page of that policy.[2]

The claimant was also a named insured under Wawanesa policy number 7878195. Although the claimant was a named insured under both the Mercury and Wawanesa policies, the Mercury policy would be higher in priority to the Wawanesa policy by operation of section 268 (5.2) of the *Insurance Act*.

According to section 268 (2) of the *Insurance Act*, AXA's policy would be third in line in the priority scheme as it insured an automobile involved in the incident.

The claimant sought payment of SABS through a paralegal representative. It is common ground between the parties that payment of SABS was sought first from the Mercury.[3] The claimant's representative submitted a SABS application (OCF-1) to Mercury with a January 6, 2010 letter.[4]

After an exchange of correspondence it was apparent to the claimant's representative that Mercury intended to handle the claimant's SABS claim on the basis that Mercury was required to provide only the benefits set out under the terms of Mercury's policy issued in the State of Florida, and not on the basis that it was required

[2] Bradbury Affidavit, paragraph 8, Exhibit B.
[3] Bradbury Affidavit, paragraph 16, Barneveld Affidavit, paragraph 4
[4] Barneveld Affidavit, Tab E.

to provide Ontario style SABS to the claimant as if it had issued a policy of motor vehicle liability insurance in Ontario.

Consequently, the claimant's representative submitted an OCF-1 to AXA with a May 12, 2010 letter.[5] The contents of this letter are important. The letter disclosed that the claimant was insured with Mercury, and it identified the policy number. The letter then goes on to state as follows:

> Mercury Insurance Company of Florida refuses to handle this claim under Ontario law/rules since they do not have an undertaking in Ontario.
>
> Moreover, I will be relying on section 268 "2" subsection "iii" of the Insurance Act as its (*sic*) relates to Statutory Accident Benefits. Please see attached same.

Reference is then made to the documentation enclosed, which included the OCF-1 and related documents, medical records, invoices, and correspondence to and from Mercury. A request is made for AXA to process the claimant's claim for SABS as soon as possible.

In the documentary evidence that has been submitted to me, I was unable to find any written reference to Mercury taking the position with the claimant's representative that it would not handle the claimant's SABS claim pursuant to Ontario insurance law on the basis that it had not filed an undertaking with the Superintendent of Insurance. I have no reason to doubt however, that the claimant's representative was told this by Mercury or counsel that Mercury had retained. The correspondence exchanged between the claimant's representative and Mercury does make it clear however, that

[5] Bradbury Affidavit, Tab I.

Mercury intended to process the claim in accordance with the benefits provided under its Florida policy. There was no evidence in the documents suggesting that it ever considered processing the claim based on Ontario law.

AXA responded to the May 12, 2010 letter from the claimant's representative with a May 26, 2010 letter.[6] The letter acknowledged receipt (on May 17, 2010) of the OCF-1, and the request by the claimant's representative to process the claimant's SABS claim. In my opinion, the import of AXA's letter is that it was not prepared to begin adjusting the claimant's SABS claim until it had conducted an investigation and obtained information about the possible existence of higher priority insurers, including the status of the one insurer of which it was aware at that time, Mercury.

Although it is not entirely clear in the evidence before me how the Wawanesa policy under which the claimant is a named insured was identified, there is no dispute about the existence of the policy or about the claimant's status at the material time.

The claimant's representative sent an August 25, 2010 letter[7] to Wawanesa, containing similar information to the May 12, 2010 letter sent to AXA, and enclosing the same documentation provided to AXA, including the OCF-1. The salient part of this letter reads as follows:

> The Mercury Insurance Company of Florida refuses to handle this claim under Ontario law/rules since they do not have an undertaking in Ontario. Also, please note a copy of all relevant document (*sic*) was sent to Axa Insurance Company, Insurer of the other driver, Axa has not process (*sic*) Mr. Rampersaud's application for accident benefits.

[6] Bradbury Affidavit, Tab J.
[7] Bradbury Affidavit, Tab K.

Wawanesa wrote a September 9, 2010 letter[8] to AXA advising that it had received correspondence from the claimant's representative. The received correspondence is not specifically identified, but I believe it is a reasonable inference to draw that Wawanesa was referring to the August 25, 2010 letter.

Wawanesa's letter points out that AXA received the claimant's OCF-1 on May 17, 2010. The letter does not say so explicitly, or address Mercury's status, but it would appear that the Wawanesa adjuster took the position that AXA was the first insurer to receive a completed OCF-1, thus acquiring the obligation to adjust the SABS claim, and, within 90 days, provide notice to an insurer or insurers who it claimed had higher priority. The letter points out that AXA had not provided written notice to Wawanesa of its intention to dispute priority within 90 days, and sought an explanation for the delay, if one could be forthcoming. An important part of the letter reads as follows:

> To date, we have not received any notice of dispute between insurers, in accordance with the Insurance Act. Therefore it is the position of the Wawanesa Mutual Insurance Company that we are not at this time accepting the above claim for accident benefits. It is our position that all claims for, and responses to accident benefits, including payments, are the responsibility of AXA Insurance.

Also on September 9, 2010, the claimant's representative wrote[9] to Wawanesa confirming a telephone conversation with the Wawanesa adjuster on that date. This letter does provide some insight into when AXA had the information confirming the existence of Wawanesa, a potentially a higher priority insurer. The letter states:

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[8] Bradbury Affidavit, Tab L.
[9] Bradbury Affidavit, Tab M.

> ...we cannot confirm the exact date and time Ms. Suzanne Newman of Axa insurance company was given information about priority coverage with Wawanesa Mutual Insurance Company, however Ms. Newman was told via telephone conference in late May of Mr. Rampersaud's priority coverage with your company. I specifically told her about the existing policy and quoted her the policy number, I also informed her of her obligation under the Insurance Act and the SABS to honour and accept our accident benefits claim as presented to her company...

This letter also contains an entreaty from the claimant's representative urging Wawanesa to accept the claimant's OCF-1 and process the claim as soon as possible.

Wawanesa did not pay any SABS to the claimant. It served a Notice Demanding Arbitration dated October 4, 2010, pursuant to the provisions of Regulation 283/95, requiring AXA to submit to arbitration to determine which of the two insurers had priority to pay SABS to the claimant.

Wawanesa followed up its Notice Demanding Arbitration with a Superior Court Application seeking a court order to compel AXA to submit to arbitration pursuant to Regulation 283/95. AXA subsequently agreed to submit to arbitration with Wawanesa. I accepted the appointment to act as arbitrator pursuant to the agreement of the parties, and the complete terms of the parties' agreement to arbitrate are contained in the Arbitration Agreement, which is Exhibit 1 in this proceeding.

In the context of this arbitration, Wawanesa initiated an interim motion to obtain a preliminary decision on the priority issue, so that there would be at least a temporary order in place requiring one or the other of the insurers to pay SABS to the claimant.

I heard that motion on November 18, 2010, and issued an Interim Award May 31, 2011, finding AXA responsible to deal with the claimant's SABS claim pending a final decision on the matter.

AXA subsequently handled the claimant's SABS claim, paying a total of approximately $60,000 in periodic, and settlement payments to resolve the claim.

The issue concerning the status of Mercury, argued before me on the interim motion, remained an issue at the arbitration hearing. I will address that issue first in this Award.

The issue for determination is whether Mercury can be considered an "insurer", pursuant to the section 268, *Insurance Act* priority rules, and the priority dispute resolution procedures set out in Regulation 283/95, and the significance of that determination for the operation of the priority dispute regulation.

Wawanesa's position on the interim motion was that Mercury was not licensed in Ontario to undertake automobile insurance[10], and that Mercury had not filed the Power of Attorney and Undertaking ("PAU") with Ontario's Superintendent of Insurance confirming that for accidents involving its insured vehicles in Ontario it agreed to provide minimum liability limits, and SABS benefits required by Ontario law.[11] Therefore, Mercury was not an "insurer" for the purposes of the priority legislation.

[10] A list of Ontario licensed insurers during the material time was submitted in evidence at tab C of the Bradbury affidavit. Mercury does not appear in the list at all, let alone in respect of automobile insurance.
[11] See section 226.1 of the *Insurance Act.*

Section 226.1 of the *Insurance Act* provides as follows:

> 226.1 Out-of-province insurers – An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule may file an undertaking with the Superintendent, in the form provided by the Superintendent, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario.

Section 251 stipulates that the minimum liability limits of a motor vehicle liability policy are $200,000. Section 265 stipulates that a motor vehicle liability policy provides uninsured automobile coverage. Section 268 stipulates that a motor vehicle liability policy provides SABS.

Wawanesa submitted that if Mercury was not an insurer for the purposes of the priority legislation, then AXA was the first insurer to receive a completed SABS application. The priority dispute Regulation requires that the first insurer to receive a completed SABS application is responsible to pay benefits to the claimant pending the resolution of any priority dispute. Further, within 90 days of receiving the completed SABS application, that insurer must serve a section 3 (1) notice on insurers with whom it wishes to dispute priority.

Wawanesa submits that after receiving the claimant's SABS application, AXA neither commenced handling his claim, nor notified any other insurer (including Wawanesa) within 90 days that it intended to dispute priority. Consequently, Wawanesa submits, AXA is left without a remedy to transfer responsibility for payment of SABS to the claimant.

On the interim motion, AXA did not dispute that Mercury was not a licensed Ontario insurer. AXA did submit however, that Mercury was bound by the PAU filed with the Superintendent by the Mercury Casualty Company, a California insurer. Therefore Mercury was an insurer for the purposes of the priority legislation, and was the first insurer to receive a completed SABS application.

AXA submits that the requirements of section 3 (1) of Regulation 283/95 to pay SABS pending the resolution of any priority dispute, and to commence the priority dispute process by serving a written notice on another insurer within 90 days, apply to only the first insurer to receive a completed SABS application. Since Mercury, and not AXA was the first insurer to receive a completed SABS application, AXA is not bound by the requirements of the priority dispute regulation with respect to serving a written notice of dispute within 90 days on an insurer or insurers with whom it wishes to dispute priority.

AXA notes that Wawanesa was subsequently served with a completed SABS application, and without paying SABS to the claimant, it nevertheless elected to engage the priority dispute resolution process involving AXA. AXA submits that since the 90 day notice of dispute requirement does not apply, the issue for arbitration is simply which of Wawanesa and AXA is the highest priority insurer according to the section 268 priority rules. On a straight application of the section 268 priority rules, there is no doubt that Wawanesa is higher in SABS priority to AXA because the claimant was a named insured under Wawanesa's policy, whereas AXA only insured a vehicle involved in the accident.

Based on the evidence submitted for the interim motion, I held that Mercury was not bound by the PAU filed by the Mercury Casualty Company. There has been no additional evidence submitted in support of AXA's PAU argument, up to and including the arbitration hearing.

I see no reason to change my earlier finding that there was no PAU filed with the Ontario Superintendent of Insurance that would require Mercury to provide Ontario SABS benefits to the claimant. Therefore, Mercury cannot be an insurer within the meaning of the Ontario legislation on the basis that it was bound by a PAU filed with the Superintendent of Insurance.

The matter does not end there however, because at the arbitration hearing AXA made further submissions in support of its position that Mercury is an insurer for the purposes of the priority dispute legislation.

AXA submits that Mercury is an "insurer" for the purposes of the priority legislation, even though it is not licensed to undertake automobile insurance in Ontario, and even if there is no PAU filed with the Superintendent requiring Mercury to provide SABS under the policy issued to the claimant.

AXA relies upon the decision of Low J., in *Economical Mutual Insurance Co. v. Liberty Mutual Fire Insurance Co.*[12] to maintain that Mercury met the definition of insurer for the purposes of the priority legislation.

Economical v. Liberty was an appeal from an arbitrator's decision dealing with an issue of entitlement to loss transfer indemnity pursuant to section 275 of the *Insurance*

[12] [2008] O.J. No. 1072, (Ont. Superior Ct.) ("*Economical v. Liberty*").

Act. Economical's insured was injured in an accident caused by a heavy commercial vehicle insured by Liberty. Although it is not clear from Low J.'s judgment, other authorities indicate that the accident occurred in Ontario.[13]

Economical sought loss transfer indemnity from Liberty. Liberty submitted that to meet the definition of "insurer" for the purposes of the loss transfer legislation, it must undertake contracts of automobile insurance as defined in section 224 (1) of Part VI of the *Insurance Act* which deals with automobile insurance. That definition reads as follows:

> 224 (1) In this Part,
>
> "contract" means a contract of automobile insurance that,
>
> (a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or
>
> (b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the statutory accident benefits schedule by an insurer that has filed and undertaking under section 226.1;...

Liberty submitted that since neither of these requirements applied to it, that it was not a section 268 "insurer", and therefore it was not required to indemnify Economical in loss transfer.

The arbitrator agreed with Liberty. The issue on the appeal, as stated by Low J., was the construction of the word "insurer", for the purposes of the loss transfer provision in section 275 of the *Insurance Act*.

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[13] See *Gore Mutual Insurance Co. v. John Deere Insurance Co.*, [2008] O.J. No. 2638, ("*Gore v. John Deere*") per Hoy J. at paragraph 24.

Low J. disagreed with Liberty's position, and with the Arbitrator's conclusion. She opined that the word "insurer" has the same meaning in Part VI of the *Insurance Act* dealing with automobile insurance, as it does in the general definitions section 1 of the Insurance Act. The section 1 definition states, "*insurer means the person who undertakes or agrees or offers to undertake a contract*".

Although the judgment does not clearly state the effect of this conclusion, it would appear that the import of Low J.'s decision is that to be an "insurer" for the purposes of Part VI of the Insurance Act, there is no requirement other than the insurer must undertake a contract.

Unexplained in Low J.'s reasoning is how one informs the meaning of the word "contract". In my view it is essential to do this because it is the undertaking of a contract that makes a person an insurer according to the section 1 definition. Once again, although Low J. does not specifically make the link in her judgment, it would appear necessary for her conclusion that the relevant meaning of the word "contract" to be used in the section 1 definition of "insurer" can only be the section 1 definition of "contract".

The definition of "contract" in section 1 states, "*contract means a contract of insurance…*".

Thus explained, Low J.'s decision means that for the purposes of the loss transfer provision in section 275 of the *Insurance Act*, as long as the party from whom loss transfer indemnity is being sought has undertaken a contract of insurance, that party is an "insurer" and is obliged to pay loss transfer indemnity under Ontario's loss transfer legislation.

Following the reasoning of Low J., the insurer from whom loss transfer is being sought does not have to be licensed in Ontario to undertake automobile insurance, and it does not have to have filed a PAU with the Superintendent. Indeed it would seem to me that this insurer does not even have to have issued a policy of automobile insurance. According to the reasoning of Low J., undertaking any type of contract of insurance would seem to be sufficient to qualify a party as an insurer, and subject to pay section 275 loss transfer indemnity.

Low J. does not base her decision on territorial jurisdiction (*lex loci delicti)* arguments. There is no discussion at all in her judgment about whether it is significant that the accident took place in Ontario, or whether it could have taken place somewhere else and the same analysis apply.

There is however, a lengthy policy discussion in the judgment suggesting that the interpretation she has placed on the word insurer promotes the purposes of the legislative objective, which she describes as follows:

> ...to spread the loss among insurers in a somewhat mechanical fashion as stipulated by the fault determination rules, favouring the economy of the regulatory process over the exactitude and corresponding expense of fault-finding through litigation on a case-by-case basis. Underlying that objective must surely have been the theory that over a long period of time and spread out over a massive number of loss transfers, what has gone around will likely come around... In the instant case, it is merely fortuitous that Liberty was the insurer of the heavy vehicle and under the scheme would be the indemnifier on this occasion. On the assumption that Liberty's policy affords accident benefits to its insured, it could equally have been the recipient of indemnification had it been the insurer of the small car.

AXA submits that *Economical v. Liberty* is a Superior Court decision that is on all fours with the present case so I am bound to follow the decision. If that was an accurate characterization I certainly would not dispute the submission.

I am of the view however, that *Economical v. Liberty* is distinguishable from the case before me simply on the grounds that it deals with the loss transfer legislation under the *Insurance Act*, and not the priority dispute legislation, so I am not bound to apply it in this case.

With the greatest of respect to Justice Low, I would say as well that her decision does not appear to be in accord with law in this area set out in other cases both from the Superior Court, and higher courts. This may well be because several relevant decisions in this area of the law do not appear to have been referred to Justice Low in the argument of the *Economical v. Liberty* case.

In my view other authorities describe the preferable interpretation of the law in this area, and lead to the conclusion that one must look to the definitions specific to automobile insurance in section 224 (1) of Part VI of the *Insurance Act* to determine the meaning of "insurer" for the purposes of the priority legislation, which also derives from Part VI of the *Insurance Act*.

It is my understanding that it is a cornerstone of statutory interpretation that specific legislative provisions, in particular – definitions, take precedence over general legislative provisions, in the absence of statutory direction to the contrary. This is especially true where there are both general and specific definitions within different parts of a statute.

In my view, one cannot properly interpret the meaning of "insurer" for the purposes of the section 268 priority dispute legislation (and for all other Part VI automobile insurance sections for that matter) without applying the section 224 (1) definition of contract to the definition of "insurer" for the purposes of part VI dealing with automobile insurance.

In *Insurance Corporation of British Columbia v. Royal Insurance Company of Canada*[14], a British Columbia resident insured by ICBC was involved in an accident with a heavy commercial vehicle insured by Royal. The accident occurred in Ontario. ICBC paid no-fault benefits to its insured at the rates prescribed by the Ontario SABS.

Goudge J.A. makes it clear that the reason ICBC paid SABS based on Ontario rates was because it had filed a PAU with the Ontario Superintendent of Insurance. It is useful here to recite some excerpts of the judgment which explain the PAU system:

> ICBC is a participant in the reciprocal scheme that exists in Canada for the enforcement of provincial motor vehicle insurance obligations. The nature and purpose of this scheme was described by Blair J.A. in *Potts v. Gluckstein* (1992), 8 O.R. (3d) 556 (C.A.) as follows at pp. 557:
>
> The reciprocal scheme provides a uniform basis for the enforcement of motor vehicle insurance claims in Canada. This ensures that a person who has entered into a motor vehicle insurance contract in one province is recognized as insured in other provinces. In the event of an accident, the insurer agrees to be bound by the law of the province or territory where the action is brought and not the province where the policy is issued. The insurer also accepts liability to the limits prescribed in its policy or, at least, to the minimum limits established in the province or territory where the action is brought.

[14] 1999 CanLawII 818 (ONCA) ("*ICBC v. Royal*").

> As a consequence of this scheme, ICBC paid no-fault benefits to its insured...at the rates provided pursuant to s. 268 of the Ontario Insurance Act...

ICBC sought loss transfer indemnification from Royal pursuant to section 275 of the Insurance Act for the benefits it paid to its insured. A judge of what was at that time the equivalent of the Superior Court dismissed ICBC's application for loss transfer indemnity on the following grounds:

> (ICBC could not be) the 'insurer responsible under subsection 268 (2) for the payment of statutory accident benefits...' within the meaning of subsection 275 (1)...It does not satisfy the description. Subsections 268 (1) and (2) apply only to contracts made in Ontario.

The Court of Appeal reversed the lower court's decision, finding that ICBC was entitled to loss transfer indemnification. It held that ICBC had chosen to participate in the PAU reciprocal scheme, and by doing so had obliged itself to pay no-fault benefits to its insured in accordance with Ontario automobile insurance law, who was involved in an accident in Ontario. By doing so, it had made itself the insurer responsible under section 268 (2) to pay SABS to its insured, thereby satisfying the definitional requirements of section 275 to be entitled to loss transfer indemnification.

Goudge J.A. reasoned as follows:

> ...an extra-provincial insurer that has chosen to participate in the reciprocal scheme is obliged to pay those SABS mandated by s. 268 (1) of the Insurance Act as if its policy were a valid Ontario motor vehicle liability policy...Hence, it meets the pre-condition of s. 275 since because of its PAU it is the insurer responsible under s. 268 (2) for the payment of statutory accident benefits.

> This conclusion does not constitute the extra-territorial application of Ontario law to a British Columbia automobile insurance contract. Rather, ICBC is an extra-provincial insurer which has undertaken through the PAU to be the insurer responsible under s. 268 (2) of the Insurance Act for the payment of SABS to its insured. As such, it is entitled as a matter of the statutory interpretation to indemnification from Royal, since it meets the pre-condition that triggers s. 275.

In my view, this decision from the Court of Appeal confirms that to qualify as an "insurer" for the purposes of the automobile insurance provisions in Part VI of the *Insurance Act*, and hence for both the statutory and regulatory provisions respecting loss transfer and priority, the insurer's contract must satisfy the definition of "contract" in section 224 (1) of the *Insurance Act*.

It is a logical inference to draw from the Court of Appeal's decision in *ICBC v. Royal* that ICBC satisfied the section 224 (1) (b) definitional requirements to be an insurer entitled to the benefit of Ontario's loss transfer indemnity scheme because it had filed a PAU with the Ontario Superintendent of Insurance. Although not specifically stated in the judgment, ICBC could not have qualified as an insurer based on section 224 (1) (a) – an insurer licensed to undertake automobile insurance in Ontario, because it is not so licensed.[15]

On the facts of the *ICBC v. Royal* case, ICBC would have satisfied Low J.'s test in *Economical v. Liberty* to qualify as an insurer entitled to loss transfer indemnity even if it had not filed a PAU. The Court of Appeal in *ICBC v. Royal* clearly must have believed that more was required (*i.e.* the section 224 (1) definition needed to be

[15] See *Unifund Insurance Company of Canada v. Insurance Company of British Columbia* (2003), 2 S.C.R. 63 ("*Unifund v. ICBC*").

satisfied), otherwise it would not have had to discuss the PAU scheme, nor would it have founded its decision entitling ICBC to loss transfer indemnity on the fact that ICBC had filed a PAU with the Ontario Superintendent of Insurance.

This case is not referred to Justice Low.

Wawanesa made reference to the decision of Justice Hoy in *Gore Mutual Insurance Co. v. John Deere Insurance Co.*[16] That case involved an accident occurring in the state of New York. The accident involved a bus registered in Ontario, and a tractor registered in Pennsylvania. The tractor was a heavy commercial vehicle insured by Sentry Insurance. The bus was insured by the Ontario insurer Gore Mutual. Gore sought loss transfer from Sentry. Sentry was not a licensed Ontario insurer, but it had filed a PAU with the Ontario Superintendent of Insurance.

Gore relied on the *Economical v. Liberty* decision in support of its argument that it was entitled to loss transfer. Sentry relied on *Unifund v. ICBC*. In *Unifund v. ICBC*, the accident occurred in British Columbia. It involved two vehicles, one a heavy commercial vehicle, that were both registered in British Columbia. The injured parties resided in Ontario. They claimed SABS from their Ontario insurer Unifund. Unifund sought loss transfer against ICBC. ICBC was not (and is not) an Ontario licensed insurer, but it had filed a PAU with the Ontario Superintendent of Insurance.

The essence of Justice Binnie's decision, writing for the majority in the Supreme Court of Canada, is that loss transfer could not be sought against ICBC because it was not an Ontario licensed insurer. The fact that it had filed a PAU with the Ontario

[16] [2008] O.J. No. 2638 (Ont. Sup. Ct.) ("*Gore v.John Deere*").

Superintendent of Insurance did not make it an "insurer" for the purposes of section 275 of the *Insurance Act*, because the PAU signed by ICBC did not apply to accidents occurring in British Columbia. Justice Binnie states:

> Unifund's problem is to find a cause of action. In this appeal we are dealing only with Unifund's quite separate and distinct claim under section 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of SABS under the Ontario Act.
>
> It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

Justice Binnie also emphasized the difference between claims that are based on common law tort principles, and claims governed entirely by the Ontario legislative scheme (in that case loss transfer). He stated:

> (indemnification is made)... According to the respective degree of fault of each insurer's insured as determined under the fault determination rules (s. 275 (2)), *i.e.* allocated not by general principles of tort but by the rules set out in Ontario regulations... There is no doubt that if the appellant (ICBC) were an Ontario insurer, it would be required to arbitrate Unifund's claim.

In *Gore v. John Deere*, Justice Hoy distinguished *Economical v. Liberty*, and applied the reasoning in *Unifund v. ICBC*, in holding that Gore was not entitled to pursue loss transfer against Sentry. Although one of Justice Hoy's points of distinction was that the accident in *Economical v. Liberty* occurred in Ontario, while the accident in

Gore v. John Deere was in the United States, in my view it was Justice Hoy's preference for the *Unifund v. ICBC* approach that was the main basis for the decision.

Justice Hoy also noted that *Unifund v. ICBC*, and the territorial limitations of the Ontario *Insurance Act* were not argued in *Economical v. Liberty*.

The reasoning of the Supreme Court in *Unifund v. ICBC* has been followed in other decisions of the Ontario Superior Court.

In *Royal & Sun Alliance Insurance Company v. Wawanesa Mutual Insurance Company*[17] Justice Newbould dealt with a situation involving an accident occurring in Vermont. The SABS claimant was operating a tractor trailer licensed and registered in Ontario. It was insured by Royal, an Ontario licensed insurer. Wawanesa insured the SABS claimant's personal automobile. Wawanesa is also an Ontario licensed insurer.

Wawanesa paid SABS and sought loss transfer indemnity from Royal. Royal argued that the loss transfer provisions of section 275 should not apply because the accident happened in Vermont. Royal submitted that the *lex loci delicti* principle of tort law should be applied. Since Vermont did not have a loss transfer system then there was no basis for Wawanesa to seek loss transfer indemnity from Royal.

It is clear from Justice Newbould's decision that he interpreted *Unifund v. ICBC* to mean that for the purpose of applying Ontario law in respect of loss transfer, the key question is whether the insurers involved are insurers within the meaning of the Ontario legislation. The location of the accident, and whether there is loss transfer legislation in place in that location, is not the determining factor.

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[17] (2006) 84 O.R. (3d) 449 (Ont. Sup. Ct.) ("*Royal v. Wawanesa*")

...There would be no purpose served in this case by looking to the law of Vermont to settle a dispute between two Ontario insurers arising from a claim made under the Act, an Ontario statute...

This distinction was recognized in (*Unifund v. ICBC*)... Binnie J. for the majority...recognized the distinction between an underlying tort action between the parties to the accident and the statutory claim between two insurers. He made clear that if ICBC were an Ontario insurer, the loss transfer provisions of s. 275 of the Act would apply.

Counsel for Royal submits that...(Justice Binnie's comment that if ICBC were an Ontario insurer it would be required to arbitrate Unifund's claim) is *obiter* and therefore not binding...While that last sentence may be *obiter*, it is the only conclusion that one could draw from the other principles enunciated by Justice Binnie, *i.e.* a claim under s. 275 of the Act is separate and distinct from the underlying tort action and the allocation between insurers under this section is not to be made by a consideration of general principles of tort law but by the rules set out in the Ontario regulations...

In the case at bar, the arbitrator was not dealing with a tort claim between the parties to the Vermont accident but rather was dealing with the second leg of the statutory accident benefits scheme under the Act requiring an allocation of the cost between two Ontario insurers. An analysis of underlying Vermont tort law is not of any assistance in determining that issue, nor is it of assistance to consider that under the Vermont accident benefits legislation there is not a loss transfer provision that allocates the cost of benefits paid under that Vermont legislation between insurers.

In *Primmum Insurance Company v. Allstate Insurance Company*[18] Justice Cameron approved of the approach taken by Justice Newbould in interpreting the Supreme Court's statement of the law in *Unifund v. ICBC*.

[18] [2010] O.J. No. 600, (Ont. Sup. Ct.) ("*Primmum v. Allstate*")

In *Primmum v. Allstate*, the SABS claimant, a Canadian resident, was injured while operating his motorcycle in North Carolina. He was insured by Primmum, an Ontario registered insurer. He received SABS from Primmum. Primmum sought loss transfer from Allstate who insured the American resident involved in the accident pursuant to a policy issued in North Carolina.

Primmum's entitlement to loss transfer depended on whether Allstate was an Ontario insurer within the meaning of the Ontario Insurance Act. Justice Cameron found that Allstate was an Ontario licensed insurer, and therefore subject to Ontario loss transfer legislation, notwithstanding the fact that the particular policy in this case was issued in North Carolina.

Justice Cameron held:

> If both of the insurers are registered in and carry on business in Ontario, they may claim loss transfer, even if the accident occurred in a non-loss transfer jurisdiction such as Vermont (*Royal v. Wawanesa*) per Newbould J. who followed Binnie J. in Unifund...In the *Insurance Act*, Allstate is an "insurer" under s. 1 and issues "contracts" because it is licensed to sell insurance in Ontario under s. 224 (1) (a).

In finding that Allstate was an Ontario insurer for the purposes of the loss transfer legislation, Justice Cameron clearly holds that one must have regard to the provisions of section 224 of the Insurance Act in determining whether an insurer meets the definition of "insurer" for the purposes of Part VI of the *Insurance Act*.

Based on my review of the law, I am of the opinion that to be an "insurer" for the purposes of the section 268 *Insurance Act* SABS scheme, the insurer must either be

licensed to undertake contracts of automobile insurance in Ontario, or the insurer must have filed a PAU with the Ontario Superintendent of Insurance.

Mercury does not meet either of these requirements, and therefore it is not an "insurer" within the meaning of the section 268 legislation.

The consequence of this finding is that AXA was the first insurer to receive a completed SABS application. Regulation 283/95 obliged AXA to deal with the claimant's SABS claim, and then if so advised, to dispute its obligation to pay SABS with other insurers, such as Wawanesa, which may have stood in higher priority pursuant to section 268 (2).

The evidence on the interim motion, and again at the arbitration hearing confirms that AXA did not comply with the requirements of section 283/95. It did not commence handling the SABS claimant's claim. It did not give written notice to another insurer, in this case Wawanesa, within 90 days from AXA's receipt of the claimant's completed SABS application.

Therefore, even though Wawanesa may hold a higher priority status than AXA under the section 268 (2) priority rules, AXA does not have an enforceable remedy against Wawanesa because it did not comply with the requirements of Regulation 283/95.

AXA raised another argument in its submissions that Mercury ought to have responded to the claimant's SABS claim, and then disputed its obligation to pay SABS pursuant to Regulation 283/95.

AXA submits that the law with respect to the application of Regulation 283/95 is that as long as there is some kind of connection – often referred to in the case law as a "nexus", an insurer is first obliged to pay SABS to the claimant, and then dispute priority, or its obligation to pay next.

The seminal case on this point is *Allstate insurance Company of Canada v. Brown.*[19] The case involved a significant component of administrative law and arbitral jurisdiction issues. It has been subsequently been held however, to stand for the proposition that an insurer who is relying on the argument that it is not an "insurer" because it cancelled its policy before an accident giving rise to a SABS claim cannot rely on that defence to avoid its Regulation 283/95 obligation to pay first, and dispute later.

I agree that the law has developed to require a "pay first – dispute later" requirement for insurers who have some nexus with the SABS claimant. As far as I am aware however, the cases have not gone so far as to require insurers to pay Ontario style SABS benefits to their insureds unless they are Ontario licensed insurers who have issued an Ontario motor vehicle liability policy, or they are extra jurisdictional insurers who have filed a PAU with the Ontario Superintendent of Insurance.

The "pay first – dispute later" approach contemplates that the insurer in question holds the status of a section 224 *Insurance Act* insurer who would have the obligation to pay Ontario style SABS benefits pursuant to its contract with the insured, but for a defence such as, for example, policy cancellation, or policy breach.

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[19] [1998] O.J. No. 2318 (C.A.) ("*Allstate v. Brown*").

I do not believe however, that absent the insurer meeting the section 224 *Insurance Act* requirements, that Ontario can require an extra jurisdictional insurer to pay SABS to its own insured in accordance with Ontario law, notwithstanding that its contract with its insured sets out entirely different contractual obligations.

The last argument I will address is the position taken by AXA that Wawanesa is not entitled to pursue arbitration pursuant to Regulation 283/95, because it did not serve a Regulation 283/95 section 3 notice to dispute priority with AXA, and therefore there is no Regulation 283/95 basis to commence arbitration.

In my reasons for decision on the interim motion I found that Wawanesa had served AXA with a Notice of Dispute between Insurers. Wawanesa's counsel took issue with that finding at paragraph 19 of his Submissions of the Applicant which states, *"Wawanesa never served a priority notice upon Axa."*. I would agree that the evidence does not disclose Wawanesa served AXA with the standard form Notice of Dispute between Insurers that is approved for giving Regulation 283/95 section 3 (1) priority notice to the insured person. I remain of the view however, that Wawanesa's September 9, 2010 letter to AXA could be sufficient to constitute "written notice" of Wawanesa's intention to dispute priority pursuant to section 268 with AXA.

Section 4 of Regulation 283/95 requires the insurer giving notice under section 3 also give notice to the insured person using a form approved by the Superintendent. There is some arbitral authority for the proposition that a section 3 notice given by one insurer to another is invalid unless it is given on the form prescribed by the

Superintendent and also sent to the insured.[20] As far as I am aware there is no court decision on the point.

I do not believe it is necessary for my decision to find that Wawanesa's September 9, 2010 letter constitutes "written notice" of its intention to dispute priority with AXA. I say that because I do not believe this arbitration is a nullity, as AXA submits it must be, if Wawanesa is found not to have served a valid Regulation 283/95 section 3 notice.

Section 7. (1) of Regulation 283/95 reads as follows:

> 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.

My reading of this section leads me to conclude that the insurer initiating arbitration does not have to have issued a Regulation 283/95 section 3 priority notice. Section 7 states simply that if the insurers cannot agree who is required to pay benefits, either the insurer paying benefits, or any other insurer against whom the obligation to pay benefits is claimed may initiate arbitration.

In this case, Wawanesa is an insurer against whom the obligation to pay benefits is claimed because it received a request from its insured's representative to pay benefits,[21] thus giving it status to commence arbitration.

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[20] See *Belair Direct Insurance Company of Canada v. Security National Insurance Company*, Arbitrator Shari Novick, April 11, 2014.
[21] August 25, 2010 Letter, Bradbury Affidavit, Tab K.

If I am found to be incorrect in this interpretation of Regulation 283/95 insofar as the entitlement to commence arbitration is concerned, I also find that this arbitration was validly commenced because both insurers consented to participate in arbitration to be conducted under the *Arbitration Act, 1991*, to have the priority issue determined. They further consented to have me act as the arbitrator to determine the issue, and entered into an arbitration agreement confirming that consent.

If there was an objection to be made with respect to the legal foundation for arbitration, then it ought to have been advanced at the time of Wawanesa's court application seeking to appoint an arbitrator.

Finally, I am of the opinion that both AXA and Wawanesa had a statutory obligation to pay SABS to the claimant when presented with his completed application, and then take whatever steps they deemed appropriate to pursue priority disputes thereafter. Neither insurer did this, although Wawanesa did commence arbitration to have the priority issue decided.

Both AXA and Wawanesa argue that they were not required to pay SABS to the claimant when presented with a completed application. This argument is founded on the wording of section 2 (1) of Regulation 283/95. Both AXA and Wawanesa submit that neither of them was the "first insurer" to receive a completed SABS application.[22] Therefore, the requirement to pay SABS to the claimant when presented with a completed application does not apply.

[22] AXA alleges that Mercury was the first insurer to receive the claimant's completed SABS application. Wawanesa alleges that AXA was the first insurer to receive the claimant's completed SABS application.

I disagree. The liability to pay SABS is not established by Regulation 283/95. That is a procedural regulation subordinate to the *Insurance Act.* One purpose of the Regulation is to provide a mechanism to get SABS payments to a claimant started as quickly as possible after an accident. That is why section 2 makes the first insurer to receive a completed SABS application "responsible" to pay SABS to the claimant. It is simply a triggering provision to get the payment of SABS underway. It does not absolve another insurer with section 268 liability to pay SABS from doing so if presented with the SABS claim, in the event that the first insurer fails to comply with section 2.

The second purpose of the regulation is to provide a mechanism to resolve disputes between insurers concerning which of two or more section 268 insurers has the highest priority obligation to pay SABS. There is much case law confirming that the purpose of Regulation 283/95 is to make sure that the SABS claimant gets SABS right away. The system provides for the fact that the claimant may not apply to the highest priority insurer. The insurer who pays SABS has the rights set out in the Regulation to seek reimbursement from another insurer or insurers who it claims is higher in the section 268 (2) priority structure.

The statutory liability of an insurer to pay SABS is established by the *Insurance Act* in section 268. Every motor vehicle liability policy is deemed to provide SABS as set out in the Regulations.[23] In this case, Wawanesa, as the insurer of an automobile in respect of which the claimant was an insured, has a statutory liability to pay SABS

[23] Section 268 (1)

under section 268. AXA, as the insurer of an automobile involved in the incident, has the same liability.[24]

An insurer against whom a person has recourse for the payment of SABS is liable to pay SABS.[25]

Section 268 (2) sets out a priority structure which determines the insurer who has the highest obligation to pay SABS from amongst other insurers, all of whom have a statutory obligation to pay SABS. The section moves in descending priority order, with downward priority movement being determined by whether the recovery of SABS is "unavailable" to the claimant from a higher priority insurer. If recovery of SABS is unavailable, then the claimant has recourse against the next insurer in the list.

It is instructive to have reference to subsection 267.8 (21) of the *Insurance Act* to determine what is meant by "unavailable". This subsection is an interpretation section intended to deal with the circumstances in which collateral amounts paid for income loss or loss of earning capacity should be deducted from an award of tort damages pursuant to section 267.8 (1). Section 267.8 (21) reads as follows:

> (21) Interpretation -- For the purpose of subsection (1), (4), or (6), a payment shall be deemed not to be available to a plaintiff if the plaintiff made an application for the payment and the application was denied.

Insofar as SABS are concerned, this section is essentially a codification of the Court of Appeal's judgment in *Stante v. Boudreau*[26] which held that income replacement

[24] Section 268 (2) 1. (i), (iii).
[25] Section 268 (3).
[26] 29 O.R. (2d) 1 (Ont. C.A.).

benefits were not available to a plaintiff if he had applied for those benefits and the SABS insurer did not pay them. Hence they were not deductible as collateral benefits.

What should have happened when AXA received the claimant's completed SABS application? Although I have found that Mercury was not an "insurer" for the purposes of the insurance legislation under consideration, even if Mercury is an insurer, AXA should have commenced handling the claimant's SABS claim, and served priority dispute notices as it saw fit. In this case, it could have served Mercury and Wawanesa. Recovery of SABS was "unavailable" (as that term has been interpreted in the case law, and in the *Insurance Act*) to the claimant under Mercury's policy, so as a section 268 insurer presented with the claimant's SABS claim, AXA was liable to pay that claim.

In the event that Mercury was the "first insurer" to receive a completed SABS application, AXA may have had an argument that it was not bound by the 90 day time limit to serve a written notice to dispute priority, since that is a matter that is governed by the terms of Regulation 283/95. Arbitral authority holds that it is only the first insurer to receive a completed SABS application who must comply with the 90 day time limit to issue a priority dispute notice.[27]

Nevertheless, even if AXA was not the "first insurer" to receive a completed SABS application, in my view it still had an obligation to deal with the claimant's SABS claim, and then separately pursue a priority dispute.

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[27] See *Wawanesa v. Peel Mutual and Economical Insurance*, Arbitrator Lee Samis, January 28, 2011 ("*Wawanesa v. Peel Mutual*"), and *Economical Insurance Company v. Motor Vehicle Accident Claims Fund, North Waterloo Farmers Mutual Insurance Company, and Jevco Insurance Company*, Arbitrator Scott Densem, January 7, 2015 ("*Economical v. North Waterloo*").

The same reasoning applies to Wawanesa. Wawanesa submits that AXA was the first insurer to receive a completed SABS application. AXA failed to comply with its obligation to pay SABS, and then commence a priority dispute. That did not relieve Wawanesa of its section 268 liability to pay SABS to the claimant when presented with his completed SABS application. Recovery was unavailable under AXA's policy, so the claimant had recourse to Wawanesa for the payment of SABS.

Wawanesa should have paid SABS to the claimant, and served a priority dispute notice on AXA arguing, as it did in this arbitration, that as the first insurer to receive a completed SABS application, AXA did not comply with Regulation 283/95 in that it did not pay SABS to the claimant, nor did it serve a timely section 3 (1) priority notice.

In summary, in my view neither insurer complied with its statutory obligation to pay SABS to the claimant when presented with a completed SABS application, although Wawanesa was the more proactive of the two because at least it initiated an arbitration to have the priority issue dealt with.

I will repeat here some comments I made in my reasons for decision on the Interim Motion, modified by my analysis in the preceding paragraphs of the relevant provisions of the *Insurance Act* and the case law:

I think it would be an incorrect interpretation of 283/95 Section 2 for the second or subsequent insurer receiving an application who has some "nexus" with the claimant to refuse to pay SABS on the grounds that the 283/95 pay and dispute rules do not apply because it was not the "first" insurer to receive an application. To interpret the regulation this way would in many cases defeat its "pay now and dispute later" purpose.

In my opinion, a section 268 insurer with a nexus to the claimant that receives a SABS application is liable to pay SABS to the claimant. The insurer should do so, and then follow the procedure in Regulation 283/95, relying upon the priority dispute resolution process to address a priority issue, or improper claims handling by an insurer who had received a SABS application, but failed to comply with its section 2 obligations.

Conclusion

1) Mercury is not an "insurer" for the purposes of the relevant insurance legislation considered herein. Consequently, AXA was the first insurer to receive a completed SABS application.

2) AXA, as the first insurer to receive a completed SABS application, did not give written notice to Wawanesa of its intention to dispute priority within 90 days of receipt of the claimant's SABS application. There is no basis pursuant to section 3 (2) of Regulation 283/95 to permit AXA to give notice after the 90 day period.

3) Having failed to serve Wawanesa with a timely priority notice, AXA is without a remedy to seek reimbursement from Wawanesa for SABS it has paid to the claimant.

4) Neither insurer complied with its section 268 liability to pay SABS to the claimant when presented with a completed SABS application by the claimant's representative, and a request for payment of SABS.

5) Before making an order as to costs, I will receive submissions from the parties. My Coordinator will contact counsel to schedule a conference telephone call on one of my

regularly scheduled pre-arbitration conference dates to discuss the format for costs submissions.

Dated at Toronto, this 26th day of March, 2015

Scott W. Densem, Arbitrator