IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.I.8, Section 268
and Ontario Regulation 283/95 made thereunder

AND IN THE MATTER of the *Arbitration Act, 1991*, S.O. 1991, c.17

AND IN THE MATTER of an Arbitration

B E T W E E N:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

OLD REPUBLIC INSURANCE COMPANY

Respondent

DECISION
WITH RESPECT TO PRELIMINARY ISSUES

COUNSEL

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

Kevin S. Adams for the Respondent, Old Republic Insurance Company

I. ISSUES

The Respondent, Old Republic Insurance Company ("Old Republic") has raised preliminary jurisdictional issues with respect to whether or not the Applicant, Wawanesa Mutual Insurance Company ("Wawanesa") is entitled to dispute priority in view of the potential defence available to Wawanesa pursuant to Section 59 of the Statutory Accident Benefits Schedule (Accidents on

or after November 1, 1996) hereinafter referred to as the "SABS". The Parties have agreed to characterize the jurisdictional issues as follows:

(1) Does Wawanesa have to make an application to the Workplace Safety Insurance Appeals Tribunal (hereinafter referred to as "WSIAT") under Section 31 of the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16 (hereinafter referred to "*WSIA*"), before pursuing priority against Old Republic?

If the answer to this question is yes, then Wawanesa will have to make an application to the WSIAT before pursuing priority against Old Republic.

(2) If the answer to the foregoing question is no and Wawanesa is at liberty to pursue the priority dispute against Old Republic, what is the scope of indemnification that Wawanesa can seek from Old Republic? Put another way, if Old Republic has priority, can Wawanesa recover benefits paid by it before the Section 59 defence is determined?

II. DECISION

(1) Wawanesa does not have to make an application to the WSIAT under Section 31 of the *WSIA* before pursuing priority against Old Republic.

(2) If Old Republic is found to be the priority insurer, Wawanesa can recover the accident benefits paid by it before the Section 59 defence is determined.

III. THE ARBITRATION HEARING

The Arbitration was held in Toronto, Ontario, on May 11, 2009, before me, J. Jay Rudolph, Arbitrator.

Counsel agreed to proceed with the preliminary jurisdictional issues by way of a Hearing on May 11, 2009. No witnesses were called and the matter proceeded on the basis of an Agreed Statement of Facts as well as a Record filed by counsel for Wawanesa. In addition, written submissions and Briefs of Authorities were filed by counsel for both parties. It was agreed that counsel for Old Republic would be the Moving Party at the Hearing of the preliminary issues.

By letter dated May 29, 2009, I advised counsel for both Parties of my decisions with respect to the preliminary issues.

IV. FACTS

As noted above, the facts were not in dispute. This priority dispute arises as a result of a motor vehicle accident that took place on November 23, 2003, involving three tractor trailers. The motor vehicle accident involved a tractor trailer insured by Old Republic. At the time of the accident, the claimant, Rimvydas Narusevicius, was an occupant in the tractor trailer insured by Old Republic. Wawanesa is the personal insurer for the spouse of Mr. Narusevicius. Wawanesa received an Application for Accident Benefits from Mr. Narusevicius and paid various accident benefits to him pursuant to the SABS. Wawanesa continues to administer the accident benefits claim of Mr. Narusevicius.

Wawanesa has commenced an Arbitration proceeding against Old Republic to dispute the priority of payment pursuant to Section 268 of the *Insurance Act* and Regulation 283/95 made thereunder. The Parties have executed an Arbitration Agreement. Old Republic has taken the position that the underlying accident benefits claim by Mr. Narusevicius is barred by Section 59

of the SABS because Mr. Narusevicius is entitled to collect workers' compensation benefits arising from the accident from the Workplace Safety Insurance Board (hereinafter referred to as "WSIB").

Wawanesa confirmed that it obtained a WSIB assignment from Mr. Narusevicius in April, 2004. Wawanesa confirmed that it obtained a second WSIB assignment from Mr. Narusevicius which was approved by and filed with the WSIB in February, 2006.

On numerous occasions, Old Republic has advised Wawanesa of its position that Section 59 should apply to bar the insured's entitlement to accident benefits. Old Republic has repeatedly requested that Wawanesa make an application to the WSIAT for a determination of the issue.

Mr. Narusevicius has commenced a tort action against various defendants, including the three drivers and owners of the vehicles involved in the accident seeking damages arising from the accident. It has not yet been determined whether Mr. Narusevicius is entitled to receive WSIB benefits and whether all the tort Defendants were workers in the course of their employment or scheduled employers for WSIB purposes, which determinations are within the jurisdiction of the WSIAT. Similarly, it remains to be determined whether Mr. Narusevicius' election to sue in tort was *bona fide*, which determination is not within the jurisdiction of the WSIAT.

The Defendants in the tort action are in the process of making an application to WSIAT, seeking a declaration that Mr. Narusevicius' right to sue is barred by the *Workplace Safety & Insurance Act*. The WSIAT Hearing is scheduled to proceed on June 1, 2009.

Wawanesa has refused to make an application (or join with the pending tort Defendants' application) to WSIAT for determination whether Mr. Narusevicius is entitled to collect WSIB benefits or to sue in tort, which determinations are required for the purpose of the potential defence available pursuant to Section 59 of the SABS.

V. THE APPLICABLE LEGISLATION AND REGULATION

Section 7 of Regulation 283/95 made under the *Insurance Act* provides in part:

> "7. (1) If the insurers cannot agree as to who is required to pay benefits or if the insured person 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. O.Reg. 283/95, s.7(1)."

Section 1 of Regulation 283/95, provides that all disputes as to which insurer is required to pay benefits under Section 268 of the *Insurance Act* shall be settled in accordance with this Regulation.

Section 2 of Regulation 283/93 provides that the first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the *Insurance Act*. As noted above, the Arbitrator shall resolve the dispute in accordance with the *Arbitration Act*, 1991.

The provisions of the *Arbitration Act*, 1991, are incorporated by reference into Regulation 283/95 and apply to all priority dispute arbitration proceedings. Section 17 of the *Arbitration Act*, 1991, provides in part:

> "17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection, rule on objections with respect to the existence or validity of the arbitration agreement."

Section 31 of the *Arbitration Act*, 1991, states:

> "31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies."

Paragraphs 3, 4 and 5 of the Arbitration Agreement signed by the Parties expands on the powers granted by the *Arbitration Act*, 1991, and these paragraphs provide as follows:

> "3. The Arbitrator shall have the power to grant any relief appropriate to the facts and circumstances that would be within the jurisdiction of a Judge of the (Ontario) Superior Court of Justice at trial in that Court.
>
> 4. The parties hereto agree to be bound by all of the terms of this Agreement, and to be bound by the rules, orders, directions and decisions of the Arbitrator respecting the procedure and conduct of the Arbitration as determined by him from time to time, subject to an appeal of the Arbitrator's decision to a Judge of the (Ontario) Superior Court of Justice.
>
> 5. The Arbitrator shall deal with any and all interlocutory matters relating to the issues in this Arbitration and shall have complete authority to make any and all interim Orders which the Arbitrator deems necessary or appropriate. Without limiting the generality of the foregoing, the Arbitrator shall have complete jurisdiction to deal with any interlocutory matters arising from the production of documents which might be undertaken by the parties."

The Parties agree that an Arbitrator is empowered by the *Arbitration Act*, 1991, and by Regulation 283/95 made under the *Insurance Act* to adjudicate disputes between insurers. Inherent in this power is the Arbitrator's ability to determine his or her jurisdiction, including the interpretation of legislative provisions and the granting of equitable remedies, as specifically provided for in Section 31 of the *Arbitration Act*, 1991.

Section 59 of the SABS states:

> "59. (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. O. Reg. 403/96, s. 59(1).
>
> (2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in Section 30 of the *Workplace Safety and Insurance Act*, 1997 so long as the election is not made primarily for the purpose of claiming benefits under this Regulation, O.Reg. 403/96, s.59(2); O.Reg. 281/03, s.30(1).
>
> (3) If a person is entitled to receive benefits under this Regulation as a result of an election made under Section 30 of the *Workplace Safety and Insurance Act*, 1997, no income replacement, caregiver or non-earner benefit is payable to the

person in respect of any period of time before the person makes the election. O. Reg. 403/96, s. 59(3); O. Reg. 462/96, s. 9; O. Reg. 281/03, s. 30(2).

(4) If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in Section 30 of the *Workplace Safety and Insurance Act*, 1997 and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program that the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 403/96, s. 59(4); O. Reg. 281/03, s. 30(3).

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 403/96, s. 59(5)."

Section 28 of the *WSIA* states in part:

"28.(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer."

Section 30 of the *WSIA* states in part:

Election, concurrent entitlements
30. (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease. 1997, c.16, Sched. A, s. 30(1).

Election
(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected. 1997, c.16, Sched. A, s. 30(2).

Same
(3) If the worker is or was employed by a Schedule 2 employer, the worker or survivor shall also notify the employer. 1997, c.16, Sched. A, s.30(3).

Same
(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death. 1997, c.16, Sched. A, s. 30(4).

Same
(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so. 1997, c.16, Sched. A, s. 30(5).

Same
(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan. 1997, c.16, Sched. A, s. 30(6).

Same, minor
(7) If the worker or survivor is less than 18 years if age, his or her parent or guardian or the Children's Lawyer may make the election on his or her behalf. 1997, c. 16, Sched. A, s. 30(7).

Same, incapable person
(8) If a worker is mentally incapable of making the election or is unconscious as a result of the injury,

(a) the worker's guardian or attorney may make the election on behalf of the worker;

(b) if there is no guardian or attorney, the worker's spouse may make the election on behalf of the worker; or

(c) if there is no guardian or attorney and if no election is made within 60 days after the date of the injury, the Public Guardian and Trustee shall make the election on behalf of the worker. 1997, c.16, Sched. A, s. 30(8); 1999, c.6, s.67(8); 2005, c.5, s73(8).

Same
(9) If a survivor is mentally incapable of making the election,

(a) the survivor's guardian or attorney may make the election on behalf of the survivor; or

(b) if there is no guardian or attorney and if no election is made within 60 days after the death of the worker, the Public Guardian and Trustee shall make the election on behalf of the survivor. 1997, c.16, Sched. A, s.30(9).

Subrogation, Schedule 1 employer

(10) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c.16, Sched. A, s.30(10).

Same, Schedule 2 employer

(11) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 2 employer or the deceased worker was so employed, the employer is subrogated to the rights of the worker or survivor in respect of the action. The employer is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c.16, Sched. A, s.30(11).

Surplus

(12) If the Board or the employer pursues the action and receives an amount of money greater than the amount expended in pursuing the action and providing the benefits under the insurance plan to the worker or the survivor, the Board or the employer (as the case may be) shall pay the surplus to the worker or survivor. 1997, c.16, Sched. A, s.30(12).

Effect of surplus

(13) Future payments to the worker or survivor under the insurance plan shall be reduced to the extent of the surplus paid to him or her. 1997, c.16, Sched. A, s.30(13).

If worker elects to commence action

(14) The following rules apply if the worker or survivor elects to commence the action instead of claiming benefits under the insurance plan:

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph 3.
2. If the worker or survivor settles the action and the Board approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph 3.
3. For the purposes of paragraphs 1 and 2, the amount is the cost to the Board of the benefits that would have been provided under the plan to the worker or survivor, if the worker or survivor had elected to claim benefits

under the plan instead of commencing the action. 1997, c.16, Sched. A, s.30(14).

Determining amount
(15) For the purpose of determining the amount of benefits a worker or survivor is entitled to under subsection (14), the amount of a judgment in an action or the amount of a settlement shall be calculated as including the amount of any benefits that have been or will be received by the workers or survivor from any other source if those benefits,

(a) have reduced the amount for which the Defendant is liable to the worker or survivor in the action; or

(b) would have been payable by the Defendant but for an immunity granted to the defendant under any law. 1997, c.16, Sched. A. s.30(15).

Section 31 of the *WSIA* states in part:

Decisions re: rights of action and liability
31.(1) A party to an action or an insurer from whom statutory accident benefits are claimed under Section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;

(b) whether the amount that a person may be liable to pay in an action is limited by this Act; or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

Same
(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

VI. SUBMISSIONS ON BEHALF OF OLD REPUBLIC

Counsel for Old Republic made the following submissions:

(1) An Arbitrator in my position has the jurisdiction to determine the overall priority dispute as well as the preliminary issues.

(2) Section 59(1) of the SABS provides a potential defence to an insurer whereby an insurer is not required to pay benefits under the SABS in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan.

(3) Section 59(2) of the SABS qualifies Section 59(1) by stating that Section 59(1) does not apply in respect of an insured person who elects to bring an action referred to in Section 30 of the *WSIA,* so long as the election is not made primarily for the purpose of claiming benefits under the SABS.

(4) Counsel for Old Republic acknowledged that pursuant to Section 59(5) of the SABS, Wawanesa is required to pay statutory accident benefits to Mr. Narusevicius because Mr. Narusevicius made an assignment to Wawanesa of any benefits under any workers' compensation law or plan to which he may become entitled as a result of the accident and the WSIB approved the assignment.

(5) Pursuant to Section 31(2) of the *WSIA*, the resolution of the dispute as to whether Mr. Narusevicius is entitled to WSIB benefits has to be made by WSIAT as it has the exclusive jurisdiction to do so.

(6) Counsel for Old Republic submitted that the decision whether an election under Section 59(2) of the SABS was not made primarily for the purpose of claiming accident benefits is not decided by WSIAT and is to be decided by a Court or by the Financial Services Commission of Ontario (FSCO). In addition, an Arbitrator does not have the jurisdiction to decide this issue.

Essentially Old Republic's position is that Wawanesa has been well aware for a long time of the potential defence that it may have under Section 59 of the *WSIA* and should be required to pursue the defence by bringing an application to WSIAT. Counsel for Old Republic concedes that it is unclear and unknown as to how WSIAT will decide the Section 31 application but counsel for Old Republic submits that it needs to be decided one way or the other by WSIAT to see if the

Section 59(1) defence applies. Counsel for Old Republic submits that Wawanesa has the standing to bring a Section 31 application and that Old Republic (in its capacity as a potential accident benefit insurer) does not have standing to make an application under Section 31 to WSIAT.

Old Republic submits that Wawanesa should have adjusted the accident benefit claim of Mr. Narusevicius without regard to the fact that it may be able to claim that Old Republic is the priority insurer.

According to counsel for Old Republic, where a potential worker's compensation issue is identified, where Wawanesa obtained an assignment and filed it with the WSIB, where Wawanesa was asked by Old Republic to bring a Section 31 application and where Wawanesa could have joined the Section 31 application of the tort Defendants, Wawanesa ought to be required by me to bring a Section 31 application.

Counsel for Old Republic submits that even if Old Republic is found to be the priority insurer, Wawanesa's delay in making the Section 31 application to WSIAT has caused the disparity between what Wawanesa has paid and what Wawanesa will receive back from WSIB pursuant to the assignment to grow. In addition, Wawanesa should not be able to foist that disparity onto Old Republic. Counsel for Old Republic submits that if I permit Wawanesa to ignore the potential defence under Section 59(1) of the SABS, insurers will be encouraged to not pursue potential defences available to them in situations where there may be a priority dispute. Accordingly, in summary, Old Republic submits that Wawanesa should now be required to make a Section 31 application to WSIAT to pursue the Section 59 defence. In the alternative, Old Republic submits that Wawanesa should not be able to collect from Old Republic (if Old Republic is the priority insurer) accident benefits paid by it until the WSIAT defence is decided.

Counsel for Old Republic acknowledges that there is no case dealing with this issue in the context of a priority dispute whereas there are a few cases dealing with this issue in the context of loss transfer disputes.

VII. SUBMISSIONS OF WAWANESA

Counsel for Wawanesa made the following submissions:

(1) There is no authority in any of the applicable legislation or caselaw that states that Wawanesa cannot proceed with its priority dispute or that it must proceed to WSIAT to obtain a ruling concerning Mr. Narusevicius' potential entitlement to WSIB benefits before it pursues its priority dispute against Old Republic.

(2) Counsel for Wawanesa relies upon a few cases decided in the loss transfer context including, the decision of *Royal & SunAlliance Insurance Co. v. Aviva Insurance Company of Canada* (June 2006) Arbitrator G. Jones and the case of *State Farm Automobile Insurance Company v. Aviva Insurance Company* (January 2009), Arbitrator K. Bialkowski.

(3) Regulation 283/95 and Section 268(8) of the *Insurance Act* are consistent with the policy that the insurer that receives a completed application for statutory accident benefits shall pay the benefits pending the resolution of any priority dispute.

(4) Counsel for Wawanesa submits (and counsel for Old Republic agrees) that the onus of proof regarding the preliminary issues is upon Old Republic.

(5) Counsel for Wawanesa submits that there is no mention in either Ontario Regulation 283/95 or Section 268 of the *Insurance Act* that an insured is precluded from disputing priority for payment of statutory accident benefits where there may be a WSIB issue involved.

(6) Section 31 of the *WSIA* provides that a party to an action or an insurer from whom statutory accident benefits are claimed under Section 268 of the *Insurance Act* **may** apply to the WSIAT to determine whether the right to commence an action is

taken away or whether the Plaintiff (insured person) is entitled to claim benefits under the *WSIA*. He emphasizes that the word "may" is clearly discretionary and that there is nothing in the legislation that requires Wawanesa to bring a WSIAT application.

(7) Wawanesa was prudent to get an assignment at an early stage and to file the assignment with the WSIB and that it was premature to bring a Section 31 WSIAT application. He noted that the Statement of Claim was issued against the tortfeasors by Wawanesa's insured at the two-year limitation period.

(8) Counsel for Wawanesa points out that Old Republic (in the capacity as an insurer of a tort Defendant) could have brought a WSIAT application once the Statement of Claim was issued in November, 2005.

(9) Counsel for Wawanesa points out that there are some WSIAT decision that provide that a statutory accident benefit insurer does not have standing to bring a WSIAT application in the absence of a live tort action. In this regard, counsel for Wawanesa referred me to WSIAT Decision No. 465/05 and WSIAT Decision No. 2035/05.

(10) Counsel for Wawanesa states that it was not until sometime in or about late 2006 that the WSIAT extended the definition of the word "plaintiff" to mean claimant and noted that the word "plaintiff" is not limited to a person who commences an action. In this regard, counsel for Wawanesa relies upon WSIAT Decision No. 1362/06I and 1362/06, decisions dated October 10, 2006, and July 25, 2007, respectively.

In summary, counsel for Wawanesa stated that Wawanesa should not be precluded from pursuing its priority dispute and should not be forced to apply pursuant to Section 31 of the *WSIA* to WSIAT.

With respect to the second preliminary issue, counsel for Wawanesa submitted that if Wawanesa is allowed to proceed with the priority dispute, Wawanesa should be able to recover fully what it has paid out even if the payments made were prior to any WSIAT decision.

VIII. ANALYSIS

There is no doubt that as an Arbitrator, I have the jurisdiction to deal with the overall issue of priority and the preliminary jurisdictional issues that are before me. In this regard, I rely upon the decision of *Unifund Assurance Company v. Insurance Corporation of British Columbia* [2001] O.J. No. 1885 (C.A.). In that case, in referring to the *Arbitration Act*, Feldman J.A. stated at paragraph 14:

> "The scheme of the Act is that where either an agreement of the parties or a statute provides for arbitration, all decisions are to be made by the arbitrator including questions of law and jurisdiction, while the role of the courts is not to intervene but to determine questions referred by the arbitrator or the parties, to hear appeals in prescribed circumstances, and to enforce the orders of the arbitrator."

It is also clear from numerous priority dispute cases that Section 268 of the *Insurance Act* sets out a priority ranking for determining which insurer is liable to pay accident benefits in situations where more than one insurer may be liable to pay those benefits.

The Financial Services Commission of Ontario Bulletin No. A-5/95 dated May 29, 1995, states that Ontario Regulation 283/95 provides protection to injured accident victims who may be entitled to benefits and are caught in the middle of disputes between insurers. An insurer that first receives an Application for Accident Benefits will be required to pay benefits pending the resolution of these disputes. The Bulletin goes on to state that Regulation 283/95 outlines a private Arbitration process to resolve these disputes between insurance companies.

In providing the general approach that ought to be taken when interpreting the *Insurance Act* and the SABS, I am guided by the following principles:

(1) I must consider not only the provisions of the *Insurance Act* but rather the entire scheme of automobile insurance legislation.

(2) The *Insurance Act* and SABS are remedial and should be given a large and liberal construction that best attains their purposes having regard to the consequences of the proposed interpretations.

It is agreed by counsel for both Parties that the onus of proof regarding the preliminary jurisdictional issues before me is upon Old Republic. In my view, Old Republic has not satisfied the onus of proof upon it. In other words, it has not established that:

(1) Wawanesa has to make an Application to the WSIAT under Section 31 of the *WSIA* before pursuing priority against Old Republic; or

(2) Wawanesa is precluded from recovering accident benefits paid by it before the Section 59 defence is determined, in the event that it is determined that Old Republic has priority.

As noted above, there are no cases on point in the context of a priority dispute. However, in the loss transfer context, I am of the view that the cases support the position taken by Wawanesa and do not support the position taken by Old Republic.

In *Jevco Insurance Company v. Continental Insurance Company of Canada* [1999] O.J. No. 2267 (S.C.J.), Jevco Insurance sought indemnification pursuant to the loss transfer provisions of Section 275 of the *Insurance Act* from Lombard Insurance Company (formerly Continental Insurance Company of Canada).

In that case, Lombard took a position similar to the position that Old Republic is taking in the case before me. At paragraph 20 of the decision, Mr. Justice Wilkins states:

> "It is the position of Lombard that, in the absence of a determination by the WSIAT and in the absence of any party having an interest to pursue a determination by the WSIAT, it will be required to indemnify Jevco under circumstances in which Jevco may have no liability to make payments and Laycock no entitlement to receive payments. Under such circumstances, Jevco would never have qualified as an 'insurer responsible under ss. 268(2) for the payment of no-fault benefits ...' and, as such, circumstance (sic) Jevco would never have qualified for any rights of indemnification under s. 275 of the Insurance Act, nor would it have been entitled to any of the three arbitration awards made. Lombard would therefore not have been liable to indemnify Jevco and Jevco would ultimately have found itself in the circumstances of being a gratuitous payor of no-fault benefits for which it had no liability to pay and no right or entitlement to indemnification under the loss transfer provisions of the Insurance Act."

In rejecting Lombard's submissions, Mr. Justice Wilkins states at paragraph 25 of the Decision:

> "There are a series of decisions which establish that the mechanism set out under the Insurance Act, in which automobile insurers who are the payors of no-fault benefits may be reimbursed or indemnified, constitutes a code for the determination of the rights both of insured persons and insurers in those respects. In addition, the jurisdiction for determination of these issues has been taken away from the courts and placed into a system of arbitration, as provided for under the Arbitration Act. ..."

At paragraph 27 of his decision, Mr. Justice Wilkins states:

> "As I set out above, the scheme established by s. 275 of the Insurance Act, in my view, clearly imposes liability upon the insurer under s. 268(2) for the payment of no-fault benefits until such time as circumstances arise to relieve that insurer of its responsibility to pay. In the absence of a ruling by the WSIAT, there was nothing before the arbitrator, Mr. Justice Cameron, the Court of Appeal or myself to alter the liability of Jevco to pay and the entitlement of Laycock to receive those no-fault benefits. That being the case, the provisions of s. 275 of the Act remain in force and effect and Lombard remains in the position of an insurer of such a class of automobile as may be named in the regulations involved in the accident from which the responsibility to pay the no-fault benefits arose and who is subject to an indemnity claim, pursuant to those loss transfer provisions, which was subject to arbitration in the event of dispute and subject to enforcement under the provisions of the Arbitration Act in the event of an award being made."

In the context of the priority dispute before me, there is no provision in the *Insurance Act* or any of the regulations enacted thereunder that requires Wawanesa to make an application to the WSIAT under Section 31 of the *WSIA* before being allowed to pursue its priority dispute against Old Republic pursuant to Section 268 of the *Insurance Act* and Regulation 283/95. I am of the view that the reasoning of Mr. Justice Wilkins is applicable to priority disputes. Accordingly, the scheme established by Section 268 of the *Insurance Act* and Regulation 283/95 imposes an obligation to pay benefits upon Wawanesa (as it was the first insurer to receive an Application for Accident Benefits) until such time as circumstances arise to relieve it of its responsibility to pay. Those circumstances could include a decision that Old Republic is the priority insurer or a decision by WSIAT that Mr. Narusevicius is entitled to WSIB benefits. However, there is no requirement that Wawanesa bring an application to the WSIAT.

Counsel for Old Republic relies upon the case of *ING Halifax v. Royal & SunAlliance Insurance Co.* [2004] O.J. No. 2187 (S.C.J.), a Judgment of Madame Justice E.M. Macdonald. In that case, ING brought an action framed in restitution for the repayment of approximately $123,000.00 paid by ING to Royal & SunAlliance Insurance Co. ("Royal") pursuant to Section 275 of the *Insurance Act* and its regulations.

In that case, following a motor vehicle accident on February 15, 1995, Royal's insured made an application to Royal for statutory accident benefits. By way of notification of loss transfer, Royal requested and received loss transfer payments pursuant to Section 275 of the *Insurance Act* from ING. Following payment by ING of the loss transfer payments to Royal & SunAlliance, the Defendants in the civil action brought an application to WSIAT which ultimately determined that Royal's insured was a worker at the time of the accident for a Schedule 1 employer and was in the course of his employment at the time of the motor vehicle accident. Accordingly, the insured's right to sue was taken away pursuant to Section 31 of the *WSIA*.

Madame Justice Macdonald decided that ING's action in restitution to recover the amounts that it paid to Royal could succeed as Royal had been unjustly enriched at the expense of ING. Counsel for Old Republic says that this case illustrates the potential for further multiplicity of proceedings if it is required to reimburse Wawanesa (if it is found to have priority over

Wawanesa) and then perhaps suing Wawanesa for reimbursement of the amounts paid by it to Wawanesa if it is ultimately found by WSIAT that this is a WSIB claim. Counsel for Old Republic submits that it would be better to force the crystallization of the issue as to whether the WSIB governs and if so, how much Wawanesa would recover by way of the assignment from WSIB before pursuing the balance that Old Republic may owe it if it is found that Old Republic has priority.

It is important to note that in that case, Royal did not receive an assignment from its insured of any entitlement he might have had for benefits arising out of the motor vehicle accident under the *WSIA*. On the other hand, in this case, Wawanesa has obtained a WSIB assignment from Mr. Narusevicius, which assignment was approved by and filed with the WSIB in February, 2006.

In addition, in my view, the Decision in *ING Halifax v. Royal & SunAlliance Insurance Co.* is not on point. It does not in any way address the issue whether an insurer that receives an application for statutory accident benefits has to pursue a WSIAT application. In fact, in that case, the Defendants in the civil tort action brought the application before WSIAT which ultimately determined that the Plaintiff's (insured's) right to sue was taken away pursuant to Section 31 of the *WSIA*. The Judge's decision in that case is that there was nothing that prevented ING's claim for restitution from proceeding against Royal & SunAlliance.

It is important to note that my decision in this case should not be seen as commenting on whether or not Old Republic would have or might have a right to pursue a claim for restitution (or some other claim) against Wawanesa in the event that Old Republic is determined to be the priority insurer, Old Republic reimburses Wawanesa for the amounts of statutory accident benefits that Wawanesa has paid to its insured and if it is later determined that Mr. Narusevicius was a worker at the time of the accident for a Schedule 1 employer and was in the course of his employment at the time of the accident.

Counsel for Wawanesa relied upon a number of cases in the loss transfer context which he argued are analogous to the situation before me. In this regard, in the loss transfer context, in circumstances where the insurer to whom an application for no-fault benefits was made obtained

an assignment and the WSIB approved the assignment, a claim for loss transfer was permitted to proceed. (See *Royal & SunAlliance Insurance Co. v. Aviva Insurance Company of Canada*, a Decision of Arbitrator Guy Jones dated June, 2006, and *State Farm Automobile Insurance Company v. Aviva Insurance Company of Canada*, a Decision of Arbitrator Kenneth J. Bialkowski dated January 12, 2009.)

In the *State Farm Automobile Insurance Company of Canada v. Aviva Insurance Company of Canada* case, Arbitrator Bialkowski states at page 5 of the Decision:

> "I am satisfied that where the provisions of Section 59(5) of the Statutory Accident Benefits Schedule are complied with, loss transfer claims are permitted to proceed."

Similarly, I am satisfied that where the provisions of Section 59(5) of the SABS are complied with, priority dispute claims are also permitted to proceed.

In summary, Old Republic has failed to satisfy me that Wawanesa has to make an application to the WSIAT under Section 31 of the *WSIA* before pursuing priority against Old Republic.

With respect to the second preliminary issue before me, I am of the view that if Old Republic has priority, Wawanesa can recover statutory accident benefits paid by it before the Section 59 defence is determined. There is no legislation, regulation or case that precludes Wawanesa from recovering the benefits paid by it before the Section 59 defence is determined. Once again, my decision in this regard should not be seen as commenting on whether or not Old Republic would have or might have a right to pursue a claim for restitution (or any other claim) against Wawanesa.

IX. CONCLUSION

For the reasons set about above:

(1) Wawanesa does not have to make an application to the WSIAT under Section 31 of the *WSIA* before pursuing priority against Old Republic.

(2) If Old Republic is found to be the priority insurer, Wawanesa can recover the accident benefits paid by it before the Section 59 defence is determined.

The Arbitration Agreement executed by the Parties provides that the payment of costs of the Arbitration, including the Arbitrator's fees, expenses and disbursements, and the quantum of such costs shall be in the sole discretion of the Arbitrator. If the issue of costs cannot be resolved by the Parties within thirty (30) days of the date that this Decision is released, I may be spoken to in order to address the issue of costs.

October 15, 2009

J. Jay Rudolph
Arbitrator