CITATION: Chubb Insurance Co. of Canada v. Zurich Insurance Company, 2024 ONSC 2929
COURT FILE NO.: CV-22-00686871-0000
DATE: 20240523

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER of the Insurance Act, R.S.O. 1990, c. I. 8, Section 268 and Regulation 283/95 made under the Insurance Act
AND IN THE MATTER of the Arbitration Act, 1991, S.O. 1991, c.17
AND IN THE MATTER of an Arbitration

BETWEEN:	)	
CHUBB INSURANCE COMPANY OF CANADA	)	Kadey B.J. Schultz and Colin MacDonald, for the Appellant
Appellant	)	
– and –	)	Eric K. Grossman and Rebecca J. Brown Greer, for the Respondent
ZURICH INSURANCE COMPANY	)	
Respondent	)	
	)	**HEARD:** May 14, 2024

AKAZAKI J.

REASONS FOR DECISION

[1] The anomalous situation giving rise to this arbitration appeal arose from Zurich Insurance Company and Chubb Insurance Company of Canada both being the primary motor vehicle liability insurer of Sukhvinder Singh's Statutory Accident Benefits (SABS), even though one issued a policy and the other did not.

[2] Zurich insured the rental Ford Windstar minivan in the typical way, by selling a policy of fleet insurance to the rental company. After the rental company refused to provide insurance particulars to Ms. Singh's lawyer, she instructed her lawyer to submit the SABS application to Chubb, whom she mistakenly assumed was the automobile insurer. The Supreme Court of Canada ultimately held, after appeals from one arbitration decision, that this misdirected application made Chubb an insurer for the purpose of Ms. Singh's SABS claim.

[3] A second arbitrator then concluded that Chubb was solely liable to pay Ms. Singh's SABS benefits and that it must reimburse Zurich $998,368.99. Chubb appeals from that decision and contends that Zurich should have been found solely responsible.

[4] I have determined that the second arbitrator's decision was in error by omitting analysis of the interplay between the automobile insurance legislation and the insurance priority dispute regulation. However, the error does not lead to the reversal of fortunes sought by Chubb. Instead, correction of the error leads to the conclusion that the two insurers were equal in priority and must share liability 50/50. The exception to that equitable remedy is that each insurer must be responsible for the 2% compound interest sanction provided in the SABS regulation, in respected of delay intervals attributable to each insurer.

THE ISSUES

[5] The priority regime under s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, is designed to pick one insurer among several that may have issued a motor vehicle liability policy to various parties injured in a traffic accident. It makes sure that no one is left without recourse to a minimum level of insurance. If there is no automobile insurance, the state-funded Motor Vehicle Accident Claims Fund appears at the bottom of the list as the insurer of last resort. Were it not for the rental company's misdirection, Zurich would have been the priority insurer and Chubb would never have been involved.

[6] The regulation for resolving priority, O. Reg. 283/95, allows the injured party to apply for benefits from any of the available insurers and to expect adjustment and payment of benefits immediately. The regulation then imposes the burden on the chosen insurer to notify another insurer within 90 days that the other insurer is higher in priority and therefore obligated to assume coverage. In the absence of grounds to extend that period, the chosen insurer cannot deny its liability to the claimant after it expires. By litigating instead of putting Zurich on notice, Chubb, too became a priority insurer on a permanent basis. Apart from these features, O. Reg. 283/95 is really intended to provide for private arbitration and to keep priority disputes out of the courts.

[7] The second arbitrator sanctioned Chubb for its initial refusal to accept the claim by treating it as the priority insurer *instead* of Zurich. The fact that Chubb ended up shouldering an insurance claim for which Zurich received the premium may seem intuitively wrong. However, the path to the result on appeal requires following several analytical steps:

1. Origin of Claim and Outcome of the First Arbitration and Appeals
2. Second Arbitral Award
3. Grounds of Appeal and Standard of Review
4. Interaction of O. Reg. 283/95 and s. 268 of the *Insurance Act*
5. Sanction for Breach of O. Reg. 283/95

ORIGIN OF CLAIM AND OUTCOME OF THE FIRST ARBITRATION AND APPEALS

[8] The first arbitration, after all three appeals, resulted in a determination that there was a sufficient nexus between the claim for accident benefits and Chubb to make it an 'insurer' for the responsibility to pay accident benefits under s. 2 of Reg. 283/95 and s. 268 of the *Insurance Act*, even though it did not insure the vehicle rented by the driver. The rationale for inserting of Chubb into a regime for requiring an automobile insurer to pay benefits pending a priority dispute will have a bearing on the outcome of the appeal, because the provisional first-insurer rule under the regulation and the priority regime under the statute operate differently.

[9] The driver, Ms. Singh, was involved in a single-vehicle accident on September 23, 2006. She returned the damaged rental car on September 25 to Wheels 4 Rent. The rental company tried several times to contact her, without success. The branch manager submitted a "records only" claim for reporting purposes, because the company's automobile policy with Zurich did not provide collision coverage. He submitted that report to McLarens, the insurance adjusting company administering the fleet coverage on behalf of Zurich. Wheels 4 Rent considered the matter closed and wrote off the damage.

[10] Several weeks later, Ms. Singh started experiencing upper body pain and decided to pursue a SABS claim. To do this, her lawyer needed to know the name of the insurance carrier and policy number. The client's recollection was that the rental agency offered coverage with Chubb. She did not know that this was only a policy of optional accidental death and dismemberment insurance which she had not purchased. Her lawyer, Murray Tkatch, telephoned Wheels 4 Rent to obtain the insurance particulars. After receiving no response, he sent a letter on November 6, 2006, to Gerry Weintraub at Wheels 4 Rent's corporate headquarters. On November 7, Ernest Weintraub, the president of the company, wrote back that it was not required to release the requested information because it was unaware of any accident. On November 9, 2006, Mr. Tkatch submitted an already-prepared OCF-1 Application for Accident Benefits to Chubb. The covering letter specifically stated that he was submitting the claim to Chubb because the rental company refused to provide information about the insurer. Chubb refused to accept the claim because it did not insure the automobile. It also failed to assist the claimant by contacting the insurance broker who also placed the Zurich fleet automobile insurance. This turned out to be a costly mistake.

[11] Chubb later argued that the November 7 letter amounted to a wrongful deflection of the accident benefits claim away from Zurich, because Mr. Weintraub was a sophisticated insured. As the second arbitrator found, the refusal to provide the insurance particulars amounted to the rental agency's violation of s. 269 of the *Insurance Act*, R.S.O. 1990, c. I.8. However, the arbitrator also declined to find that this amounted to a deflection of the SABS claim by Zurich, since Zurich did not find out about the claim until June 3, 2008. This came about after Chubb refused to accept Ms. Singh's claim and after further inquiries by Mr. Tkatch. Had Mr. Weintraub provided the insurance information instead of refusing to provide it, there is no doubt that Ms. Singh's lawyer would have submitted the OCF-1 to Zurich instead of Chubb.

[12] The other side of the deflection argument was that, as the second arbitrator found, Chubb could easily have ascertained that Zurich was the automobile insurer. Had Chubb done so, it could have set up an undisputable redirection of the claim to the proper insurer within the 90-day period under s. 3 of O. Reg. 283/95. Counsel for Chubb argued that, in 2006, the legal landscape was different than in 2015, after the Supreme Court of Canada held that Chubb ought to have responded to the SABS claim immediately on a 'pay first and dispute later' basis. I agree that this court should be cautious about superimposing current conduct expectations on decade-old circumstances. Nor does this court possess the jurisdiction to revisit the Supreme Court decision that determined the legal relations of the parties in 2006.

[13] The lengthy trajectory to that 2015 decision and its outcome can be summarized very briefly. After being notified of the claim, Zurich began to adjust and pay the claim on a without-prejudice basis in 2009. This halted the mediation-arbitration proceedings pending before the Financial Services Commission of Ontario (FSCO), the adjudicative body at the time. Zurich started an arbitration with Chubb under s. 7 of O. Reg. 283/95 under the *Insurance Act*. The issues on the arbitration were threefold:

1. Whether Chubb was an 'insurer' for the purposes of s. 268 of the *Insurance Act* and O. Reg. 283/95;

2. if Chubb was an 'insurer' for such purposes, whether it complied with O. Reg. 283/95; and

3. the amounts, if any, was Chubb responsible for indemnifying Zurich.

[14] The first arbitrator held that Chubb was not an 'insurer' because there was no nexus between it and the SABS claim. On appeal to this court, Goldstein J. set aside the arbitral award to Chubb on the basis that the claim submission to Chubb, albeit remote, was not arbitrary: 2012 ONSC 6363. Chubb appealed successfully to the Court of Appeal, subject to the dissenting opinion of Juriansz J.A.: 2014 ONCA 400. The Supreme Court then restored Goldstein J.'s decision, by adopting that dissent: 2015 SCC 19.

[15] In a nutshell, Ms. Singh's vague recollection about seeing Chubb's name at the rental office was sufficiently non-arbitrary to require Chubb to step into the shoes of the "first insurer" for the purposes of s. 2(1) of the regulation:

> 2.(1) 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 Act. O. Reg. 283/95, s. 2.

[16] As described in the prevailing appellate decisions, the purpose of this regulation was to prevent SABS claims, including vital treatments and income benefits, from being delayed while insurers fought over priority under s. 268(2) of the *Insurance Act*. In adopting para. 34 of Juriansz J.A.'s dissent, the Supreme Court also accepted that there would have been no nexus if Chubb did not provide automobile insurance in Ontario. Because it did write such policies, it qualified as an 'insurer' who first received the OCF-1, albeit mistakenly.

[17] After six years, the above process answered question #1 of the arbitration agreement by restoring para. 35 of Goldstein J.'s decision:

> The Application is allowed and the Arbitrator's decision is set aside. The matter is remitted back to the Arbitrator to determine the remaining issues on the priority dispute arbitration.

[18] Chubb then took over the adjustment of the claim from Zurich. The two insurers proceeded to the arbitration of the remaining two issues.

SECOND ARBITRAL AWARD

[19] The arbitration could not continue with the original arbitrator, due to his passing. The insurers could not agree on an arbitrator. On May 16, 2018, Dow J. appointed the Hon. Douglas Cunningham as the arbitrator for the remaining issues in dispute: 2018 ONSC 1907. Since the first arbitrator's decision is no longer a factor on this appeal, I will refer to the second one, Mr. Cunningham, henceforth as "the arbitrator."

[20] On August 5, 2022, the arbitrator awarded Zurich $998,368.99, plus prejudgment interest and costs, to be paid by Chubb. In answering the third question in the arbitration, he appears to have concluded that Chubb bore sole liability for the SABS claim by also finding against Chubb on the second question, *viz*. that it breached O. Reg. 283/95.

[21] The first nineteen paragraphs of the award set out the chronology of events and steps up to the 2015 Supreme Court ruling. At para. 20, he stated:

> The Supreme Court having determined a nexus existed between Chubb and Ms. Singh, the issue squarely before me is to determine which insurer is liable to pay statutory accident benefits to Ms. Singh as the priority insurer.

[22] I pause to observe that this question was *not* before the arbitrator. Neither of the second and third questions in the arbitration agreement required him to assign priority in this way.

[23] In paras. 21-22, he went on to describe the obligation of the first insurer recipient of an OCF-1 form to assume responsibility to adjust and pay appropriate accident benefits, as well as the 90-day period, subject to extension in certain circumstances, to dispute its obligation by providing notice to every insurer who it claims is required to pay under s. 268 of the *Insurance Act*. (The arbitrator incorrectly cited the provisions applicable to accidents after 2010, but nothing turns on this because the operative wording is similar.)

[24] In paras. 23 to 43 of the award, the arbitrator considered whether Zurich could have been deemed to have received a completed OCF-1 application in November 2006. This analysis included inferences that could have been drawn from various communications and reports among Ms. Singh's lawyer, the rental company's representatives, and the insurance adjuster for Zurich. He considered the company's breach of s. 269 in failing to provide insurance particulars to the lawyer, as well as the question whether the company and the adjuster had

reason to believe that Ms. Singh intended to file a SABS claim with Zurich. Thus, at para. 43, the arbitrator found that "nothing that could be considered an accident benefits claim ever made its way to Zurich until sometime after June 3, 2008," after the lawyer discovered that Zurich was the actual automobile insurer. He found, in paras. 44-49, that Chubb could easily have identified Zurich at the outset and avoided the whole problem, instead of waiting for 18 months.

[25] The arbitrator then concluded, in paras. 50-62, that Chubb was the first recipient of the OCF-1 and should have begun investigating, adjusting, and paying benefits. It was then incumbent on Chubb to try to discover who the real automobile insurer was and to put that insurer on notice. He found, at para. 57, that Ms. Singh, who had pre-existing mental health issues, deteriorated dramatically during the period of delay.

[26] Counsel for Chubb urged at the appeal hearing that the implication that Chubb was responsible for the delay was contrary to his earlier finding, at para. 42, that the claimant's condition only began to deteriorate in 2009. Chubb further argued that if such deterioration could be due to delay in treatment or payments, it occurred after Zurich's without-prejudice undertaking to take over the claim in 2009.

[27] While I appreciate the apparent contradiction between paras. 42 and 57 on this point, the arbitrator's reasons could well have meant to explain that the 2006-09 period without treatment could have led to the deterioration after 2009. The evidence behind the curtain consisted of information from the claim and not any forensic etiology of the course of Ms. Singh's impairments. I take the arbitrator's commentary in these paragraphs to mean only that if Chubb had responded properly to the claim in 2006 and handed over responsibility to Zurich within 90 days, Ms. Singh would have had the full benefit of the Ontario SABS benefit scheme for whatever chance she had to avoid deterioration of her pre-existing condition. I did not read them as attributing cause and effect in the manner of a tort claim. In this light, there was no real contradiction between the paragraphs.

[28] Starting at para. 63, the arbitrator explored "the impact of Chubb failing to give notice within 90 days, let alone its failure to investigate at all … given Zurich's argument that Chubb ought to be entirely responsible for the payment of Ms. Singh's accident benefits." Chubb's argument was that it could not be the priority insurer because Zurich was the actual motor vehicle insurer.

[29] The arbitrator considered the Court of Appeal's decisions in *Kingsway General Insurance Company v. Ontario*, 2007 ONCA 62, as well as *Wawanesa Mutual Insurance Company v. Lombard Canada*, 2010 ONCA 383, as requiring the court to sanction an insurer for having failed to accept a claim at least provisionally under s. 2 of O. Reg. 283/95. He also explored the consequences of such an insurer's failure to give notice to other insurer(s) within 90 days under s. 3. The arbitrator also observed that the Court of Appeal considered the breach of s. 2 to be serious but not automatically leading to permanent liability for the claim.

[30] He then considered *Kingsway General Insurance Co. v. West Wawanosh Insurance Co*., 2002 CanLII 14202, 58 O.R. (3d) 251, in which the Court of Appeal considered whether the

first-recipient insurer gave notice under s. 3 under O. Reg. 283/95 or whether the 90-day period should be extended.

[31] Finally, the arbitrator cited para. 62 from the decision of Strathy J. (as he then was) in *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co*. (2008), 94 O.R. (3d) 62 (Ont. S.C.J.). For the sake of completeness, I add and italicize the final two sentences omitted from para. 82 of the award:

> 62 In my view, there is much to be said for an inflexible rule that an insurer who fails to pay benefits and fails to put other insurers on notice on receipt of an application, with which there is some nexus, should be found permanently responsible for the claimant's benefits. This promotes compliance with the statutory scheme. It is no more inequitable than fixing permanent responsibility on the first insurer, who initially pays the claim but fails to give timely notice to the other insurer under subsection 3(2). *It is not necessary, in this case, to decide whether the rule should be inflexible. It is sufficient to say that I agree with the Arbitrator's decision on the facts of this particular case.*

[32] The arbitrator distilled these decisions as follows, before concluding that Chubb, not Zurich, was liable to pay Ms. Singh's benefits as the priority insurer:

> 83. One sees a steady trajectory in the reasoning from Sharpe JA in *West Wawanosh* to Laskin JA in *Kingsway* to Sharpe J [*sic*] in *Lombard*. For there not to be consequences would be to defeat the legislation's public policy: pay now and dispute later. A policy that ensures the provision of accident benefits in a timely manner such that claimants do not end up in the middle of disputes between insurers. As Sharpe JA noted in *West Wawanosh*: "Insurers subject to this regulation are sophisticated litigants who deal with these disputes on a daily basis." And those comments were made over 20 years ago.

GROUNDS OF APPEAL AND STANDARD OF REVIEW

[33] There was no dispute over the appellate standard of review in a general sense.

[34] Pursuant to s. 7 of O. Reg 283/95, the arbitration was to be conducted pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17 (*Arbitration Act*). The jurisdiction to hear the appeal from an arbitration lies to this court under s. 45 of the *Arbitration Act*. The standard of review under the arbitration agreement in this case was already determined by Goldstein J. in the appeal from the first arbitration: *Zurich Insurance v. Chubb Insurance*, 2012 ONSC 6363, at para. 8:

> The arbitration agreement between the parties provides for an appeal to a judge of the Superior Court of Justice on a question of law or a question of mixed fact and law. The arbitration agreement itself sets out that the standard of review on a question of law is correctness. On a question of mixed fact and law, the standard of review is reasonableness.

[35] The arbitration agreement did not provide for appeals on questions of fact alone.

[36] The notice of appeal cited numerous grounds, including various grounds embedded in the prayer for relief. These included assertions that the arbitrator inflexibly sanctioned Chubb by deeming it the sole insurer when a flexible approach was required, insufficiency of reasons, disregard for the reality that it was Zurich's dispute and not Chubb's, incorrect interpretation of the applicable legal standards, and failing to provide procedural fairness. I will not consider various grounds characterized as failures to consider evidence, because the arbitral agreement provided no appeal on questions of fact alone.

[37] The notice of appeal did not expressly state the arbitrator's recasting of the two remaining questions in the arbitration, although this has to be an integral element of considering grounds such as the employment of an inflexible legal test or the lapse in procedural fairness. The two questions deal with the legal consequences of the determination in the first arbitration that Chubb was an insurer for the purposes of the statute and the regulation.

[38] Appellate review of the second arbitral award therefore needs to start with the arbitrator's appreciation of the interaction of the statute and the regulation before concluding that Chubb was in breach and imposing the sanction for that breach. This statutory interpretation exercise, obviously an issue to be settled on a correctness standard of appellate review, requires the appellate court to begin with the conclusion it would have made in the lower tribunal's place: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653, at para. 15.

[39] The appellate review of the decision to impose on Chubb sole responsibility as if it were the priority insurer under s. 268 is a question of mixed fact and law because it requires application of the appropriate legal framework on the facts. The sanction, framed as an indemnity claimed by Zurich in the third question in the arbitration, can therefore save the arbitral award even if this court finds an error of statutory interpretation on the correctness standard, if the decision comes within a range of reasonable outcomes when the correct law is applied to the facts. The reasonableness standard for questions of mixed fact and law requires the appellate court to focus on the actual decision under review and a tracing of the decision maker's reasoning without fatal flaws in the overarching logic, including "analysis, inference and judgment" (*Vavilov,* para. 102).

INTERACTION OF O. REG. 283/95 AND S. 268 OF THE *INSURANCE ACT*

(a) Positions of the Parties

[40] Chubb's principal position on the appeal was that Zurich improperly deflected the whole claim to Chubb. Had the rental company, as a sophisticated insured, responded to Ms. Singh's lawyer properly, Zurich would have had to respond as the s. 268 priority insurer. Insofar as Chubb became liable to Ms. Singh under s. 2 of the regulation, Chubb's position was that s. 2 did not impose permanent liability on Chubb and the arbitrator failed to follow the court precedents requiring a flexible approach.

[41] The arbitrator rightly analyzed Chubb's point on deflection to have been a counterfactual argument and not as grounds for finding that the rental company's misconduct should attract liability on Zurich's part. Zurich agreed with that finding and contended that the arbitrator was correct in concluding that Chubb became the sole insurer on the claim. Zurich maintained that Chubb's failure to dispute priority within the 90 days disentitled Chubb from taking the position that Zurich should be liable for the claim.

[42] In staking out their respective positions, the parties forcefully pointed the finger at the other based on Zurich's liability under the statute and Chubb's under the regulation. I could see how they may have driven the arbitrator into error by requiring him to choose between such opposed views when, in plain sight, the solution was that they were both equally on the hook for the claim by operation of the separate legislative provisions.

(b) Interpreting O. Reg. 283/95 in the Context of s. 268 of the Insurance Act

[43] The overarching logic of the arbitrator's award started with the Supreme Court's ruling that there was a sufficient nexus between Ms. Singh and Chubb that it was an insurer for the purposes of s. 268 of the *Insurance Act* and O. Reg. 283/95 and concluded by imposing as a sanction that Chubb be the priority insurer solely liable for the payment of the SABS benefits. He explained how Chubb's breach of ss. 2 and 3 of O. Reg. 283/95 made it sanctionable and incapable of disputing its obligation to pay benefits. However, his award did not reveal consideration of the effect of deeming Chubb an automobile insurer for the purposes of s. 268. The award referred to s. 268 several times without examining how it settled the insurers' competing positions. In the absence of this statutory analysis, the appellate court is required to start afresh.

[44] O. Reg. 283/95 is a regulation made under the *Insurance Act*. The modern approach to interpretation requires the application of two principles. First, the regulation has to be read in the context of the enabling act as a whole. Second, because regulations are submitted to industry consultations and amendments before proclamation, they tend to reflect important policy choices "to ensure order and stability in regulated industries." See: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 SCR 533, at paras. 99-100. With these two interpretive principles in mind, I turn first to s. 1 of the regulation:

> 1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

[45] In particular, s. 268(2) of the *Insurance Act* provides a hierarchy of insurers whose policies could be available for a claim. The insurers are ranked based on contractual proximity to the insured person. Thus, the priority insurer for no-fault benefits is one's own insurance carrier, followed by the insurer of the automobile without regard to insured status, followed by the insurer of any other automobile involved, followed by the provincial fund as the insurer of last recourse. The clear intent is to make sure no one is left without coverage and to distribute underwriting risk based on closeness to the claimant, notably the claimant's occupancy of the vehicle in which she suffered the injury:

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

[46] These subsections first limit the claimant's recourse to the insurer with the highest ranking on the priority list and then affix liability on that insurer.

[47] There are situations where an injured party might have recourse against more than one insurer of equal priority. For example, a driver of a company car could be insured by the employer's insurance and also by one's personal automobile insurer. In such instances, the claimant is entitled to choose the insurer:

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

[48] Priority most frequently becomes an issue when the injured party is not an operator of the involved vehicle and does not own a vehicle. For example, a pedestrian struck by another's vehicle after parking his or her car will have recourse to the insurer of the parked car and not that of the driver of the vehicle causing the collision. But another pedestrian who does not own a vehicle would have recourse against the insurer of the vehicle that struck him or her. In these typical scenarios, the list in s. 268(2) imposes priority only because it does not allow

the claimant to apply for benefits from an insurer lower in the list. In this case, it was not disputed that Zurich was the priority insurer because Ms. Singh did not have her own car insurance and she was injured while driving the rental agency's vehicle. If it had been a two-vehicle collision, she did not have recourse against the insurer of the other vehicle.

[49] The priority rules under the *Insurance Act* have supplanted the doctrine of equitable contribution otherwise applicable to duplicate insurance. In instances of multiple insurers of equal priority, the claimant's election determines priority under s. 268(2), provided the election is informed one, in the sense that the claimant is aware of multiple policies and the right to choose: *Jevco Insurance Co. v. Pilot Insurance Co*., 2003 CanLII 5265 (ON SC), at para. 7, and *Intact Insurance v. Economical Mutual*, 2021 ONSC 7750, at para. 70-75.

[50] In this case, however, there was no informed election. At paras. 38-40 of his award, the arbitrator found that the claimant's lawyer submitted her OCF-1 to Chubb because of the rental company's breach of s. 269 in refusing to provide insurance particulars. Indeed, the rental company's response failed to disabuse Mr. Tkatch of the stated belief that Chubb was the insurer. There was no decision, in the sense of the claimant's discretion under s. 268(4).

[51] The first arbitration, after appeals, concluded with the determination that Chubb was an insurer for the purposes of s. 268 and the regulation. The entry point for that "nexus" determination was s. 2 of O. Reg. 283/95:

> **2.** (1) 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 Act. O. Reg. 283/95, s. 2.
>
> (2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010. O. Reg. 38/10, s. 2.

[52] The Supreme Court adopted Juriansz J.A.'s "nexus" analysis to answer the first question in the arbitration in the affirmative. In the second arbitration, the arbitrator made a factual finding that Chubb was the "first insurer" to receive a completed application. The unassailable reasoning was that Chubb did receive such an application in November 2006, and Zurich did not. He did not accept Chubb's assertion that Zurich "deflected" the claim to Chubb, because Zurich itself had no knowledge of it until months later. I need not consider that deflection argument, repeated on appeal, except that the rental company's violation of s. 269, although having no bearing on Zurich, was part of the factual matrix of the case.

[53] As a matter of legislative and regulatory purpose, the arbitrator correctly cited the public policy decision to require an automobile insurer to start a claim under s. 2 even if the priority insurer were another insurer. This relieved the claimant from having to wait, sometimes for months, while insurers fought over priority. The *provisional* liability of the "first insurer" under s. 2 of the regulation is subject to the priority dispute under s. 268. That means the "first insurer" wording does not mean that it is a priority insurer. To consider the wording as importing any form of priority under s. 268 defies the logic of the interaction between the regulation and the statute. It is s. 268, and s. 268 alone, that determines priority.

[54] I observe, in passing, that the sanctions described in the case law cited by the arbitrator, including those at the Court of Appeal, are judge-made sanctions. As a matter of principle, there is no difference between an insurer's failure to pay under s. 2 and a failure under any provision of the SABS, which was in this case O. Reg. 403/96. Under that pre-2010 regime, the main disincentive for an insurer to delay adjustment and payment of benefits was compound interest of 2% per month under s. 46. Given that the regulation defined the penalty for an insurer's breach of the obligation to pay, the "sanction" described in the case law seems very close to the "nominate tort of statutory breach" rejected by the Supreme Court in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, at 225. Since the Court of Appeal decisions are more directly on point, I am obliged to follow them and leave it to these or other parties to test the theory at a higher level of court than mine. That said, in the circumstances of this case, the 2% provision should be a factor in imposing on the appropriate insurer the sanction that was, in fact, codified by regulation.

[55] Section 2 of the regulation therefore imposes a clear obligation on the first insurer to receive a completed application for SABS benefits to start adjusting and paying the claim, "pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act." Before returning to s. 268, I refer to s. 3(1), which reads:

> 3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

[56] I heard Chubb's extensive argument that Zurich deflected the claim and deprived Chubb of the opportunity to give notice within the 90-day period. The arbitrator correctly held, and I have no appellate jurisdiction to overturn, that Chubb made no investigation to determine the actual automobile insurer, as required under clause 3(2)(b), to justify an extension of the 90-day period. Both Chubb's death and dismemberment policy and Zurich's automobile policy were brokered by the same insurance broker. Instead of denying the claim, it ought to have started the claim and inquired with the broker about the automobile insurance carrier. There is no basis to disturb the arbitrator's findings that Chubb was the first recipient of the OCF-1 application and that it allowed the 90-day period to lapse.

[57] The statutory estoppel in s. 3 of the regulation precludes an insurer from starting a dispute of the obligation to pay benefits under s. 268 of the *Insurance Act*. The issue of whether the insurer can have the 90 days extended can be part of an arbitration under s. 7. Since the purpose of the regulation is to govern disputes between insurers under s. 268 of the statute, the plain reading of s. 3 is to preclude an insurer whose obligation a claimant has triggered by submitting a claim, perhaps to the wrong insurer in priority, under s. 2, from starting a priority dispute. Priority is the only issue among insurers under s. 268. In most instances, s. 268 operates mechanically and there should be no dispute as such.

[58] To complete the dispute-resolution framework, s. 10 of the regulation provides for insurers notified under s. 3 to notify other insurers, as contemplated in multi-vehicle or multi-policy situations (including insurers of equal priority, per italics added):

> 10. (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have *equal* or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).

[59] The above provisions in O. Reg. 283/95 therefore provide a logical framework for orderly resolution of priority disputes, including the preclusion of disputes, contesting the first insurer's obligation to pay benefits under s. 268. Section 268, however, provides for liability based on the priority of insurers and, among insurers of the same priority, a choice by the claimant to choose. Beyond that claimant's choice, there is no statutory provision picking the responsible insurer for the purpose of adjusting and paying the claim. The estoppel under s. 3 of the regulation precludes a dispute by the "first insurer" of "its obligation." Usually, that means that it is the priority insurer and that no other insurer is ahead of it.

[60] The use of the word "equal" in s. 10 is also significant because it creates an estoppel by insurers further down the notice chain. However, s. 3 does not contemplate a notice by the s. 2 "first insurer" to an insurer of equal priority, and the only dispute precluded by a failure to give notice under s. 3 is the first insurer's obligation.

(c) The Law of Duplicate or Overlapping Insurance

[61] It is a fundamental principle of insurance law that, in cases of overlapping or duplicate coverage for the same risk, the insured may recover only the value of the actual loss but has the absolute right to select the insurer from whom to seek recovery. The selected insurer has a right to obtain equitable contribution pro rata from the other insurer(s): *Family Insurance Corp. v. Lombard Canada Ltd*., [2002] 2 S.C.R. 695, at para. 14. I need not consider whether the "choice of insurer" provisions in s. 268, such as s. 268(4), preclude a claim for equitable contribution based on that principle, as the *Jevco* and *Intact* decisions appear to have held by settling priority based on the informed choice made by the claimant.

[62] Nevertheless, in observing that the "choice of insurer" provisions only codify, for the purpose of clarity, the equitable doctrine that the insured always has the choice between insurers of the same risk, the legislation is silent as to what is to happen where there are two or more insurers at the same level of priority, where there has been no informed choice. Indeed, the issue here must be determined against the backdrop, not of deflection by Zurich, but of the mistaken belief of the claimant that Chubb was the automobile insurer.

[63] Reading the regulation in the context of s. 268 of the statute, it is evident that it was intended to provide a framework for allowing claimants to submit applications for SABS benefits while leaving automobile insurers to dispute priority. By inserting into this regime an insurer who did not provide automobile insurance to any of the involved parties or vehicles, the effect of the Supreme Court's decision was to insert Chubb into priority position with Zurich. That was the effect of the answer to the first question in the arbitration.

(d) Equal Priority in this Case

[64] The consequences of Chubb's breaches of ss. 2 and 3 of the regulation must follow the regulation and the statute. The immediate consequence was that Chubb had an obligation to

pay benefits as the first insurer to receive the OCF-1. The second consequence, 90 days later after it performed no investigation of the proper recipient, was that it precluded itself from disputing its obligation to pay the benefits. I agree with Chubb's submission that, according to the case law, breach of s. 2 does not result in an insurer being required to pay benefits to the claimant permanently. The failure to avail itself of s. 3 does. Chubb's permanent liability to pay benefits was a self-inflicted consequence of its failure to adhere to the requirements of both s. 2 and s. 3. This combination of provisions in the regulation transformed Chubb's provisional liability to Ms. Singh into a permanent one.

[65] This does not end the interpretation of the regulation and the statute. If Chubb's failure to follow the regulation made it Ms. Singh's insurer, the statute did not relieve Zurich of its responsibility under s. 268(3) and provided no mechanism for it to be relieved itself of that obligation. Because of the physical impossibility of an injured claimant to have been the occupant of more than one vehicle in a traffic accident, ordinarily an insurer in Zurich's position would stand alone as priority insurer. Chubb, however, inserted itself into that priority ranking alongside Zurich, by operation of ss. 2 and 3 of the regulation.

[66] In *Allstate Insurance Company of Canada v. Progressive Casualty Insurance Company of Canada*, 2002 ONFSCDRS 109, the FSCO appellate tribunal applied the equitable contribution doctrine between SABS insurers of equal priority where there were overlapping injury claims against separate insurers arising from two accidents. The case on appeal here is one of insurers of equal priority, Zurich as the actual insurer in priority and Chubb as the insurer placed in that position out of happenstance. In the absence of a statutory provision allowing Zurich to be lowered in priority, the principles applicable to duplicate or overlapping insurance apply.

(e) Conclusion re Statutory Interpretation and Equal Priority

[67] Insofar as the arbitral award did not perform the exercise in statutory interpretation leading to this conclusion, or to any extent approximating it, the arbitrator erred by failing to provide adequate reasons demonstrating that he fully considered the interaction of O. Reg. 283/95 and s. 268 of the *Insurance Act*. When one performs that analysis, it is clear that the unusual facts of this case created two permanent insurers on the claim of equal priority. There was no provision in the legislation to put Chubb ahead of Zurich, or vice versa.

SANCTION FOR BREACH OF O. REG. 283/95

(a) Positions of the Parties

[68] Chubb's position was that the sanction the arbitrator imposed was inflexible and wholly out of proportion with its failure to administer the claim in the opening period. Moreover, the claimant's condition deteriorated starting from the time Zurich assumed handling of the claim and failed to provide benefits for a considerable period.

[69] Zurich argued that Chubb's initial position lasted until the Supreme court ultimately ruled against Chubb on the threshold issue of its status as 'insurer' for the claim. It was Chubb

whose intransigence caused the claimant's deterioration and prejudiced Zurich's ability to mitigate the harm by providing benefits earlier.

(b) Applicable Law

[70] Neither of the parties' positions directly addressed the legal basis for the sanction within an area of law whose statutory and regulatory provisions are a complete code and are frequently updated to meet public policy objectives balancing the rights of injured parties and insurers.

[71] As I stated earlier, I am bound to follow the Court of Appeal guidance regarding the imposition of a sanction on an insurer failing to accept a claim under s. 2 of the regulation. In this appeal from the arbitrator, one must question the logic of punishing Chubb by requiring it to replace Zurich. That sanction benefits Zurich but offers no succour to the injured party, whose benefits claim was delayed in the process. If she availed herself of the 2% monthly compound interest, Chubb should be responsible for any portion of her SABS settlement attributable to that regulatory sanction for the period up to Zurich's commencement of payments. That not only seems to be the most just allocation of sanction in the case, but it also aligns with the legislative sanction for insurer non-payment in all cases.

[72] In the absence of a codified sanction for Chubb's breaches of the regulation, the case law providing sanctions for an insurer's breach of s. 2 provides no definitive guidance in an instance where the insurer in breach is only a deemed insurer and where the obvious primary insurer under s. 268 is standing in the wings. In light of this, can the arbitrator's sanction be considered unreasonable?

(c) Does this Case call for a Sanction or Legal Conclusion?

[73] Considering Strathy J.'s decision in *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.*, quoted by the arbitrator and reproduced above, the sanction against Chubb is the imposition of permanent liability is equivalent to the legal consequence of its having failed to give notice to Zurich under s. 3 of the regulation. It is not a sanction but, rather, a logical conclusion for failing to give notice.

[74] Chubb's failure to avail itself of s. 3 was a self-inflicted prejudice and had nothing to do with the harm and inconvenience to the claimant caused by its refusal to accept the claim under s. 2, apart from a matter of temporal sequence. Given that the purpose of s. 2 was to prevent priority disputes among insurers from holding up claims, the drafters of the regulation clearly intended a logical separation.

[75] By imposing *sole* liability on Chubb, contrary to the imposition of liability on Zurich by s. 268(3) of the *Insurance Act*, the arbitrator relieved Zurich of its obligation without grounds to do so. In this regard, the sanction he imposed on Chubb fell beyond the range of reasonable legal outcome. The jurisprudence cited by the arbitrator should be distinguished because they dealt with the sanctions or loss of rights of an insurer to assert a priority dispute. As between Chubb and Zurich in this case, their dispute was mischaracterized by the arbitrator as an insurance priority dispute. The proof of this is that there is no means of determining priority between them *qua* issuers of motor vehicle liability policies under s. 268. Chubb's equal priority status should not be considered a sanction for breach of s. 2.

Rather, that status is a legal conclusion resulting from its failure under s. 3 to dispute responsibility to the claimant.

(d) Conclusion regarding the Sanction

[76] The arbitrator's sanction must therefore be set aside and replaced with one dividing the SABS obligation equally between the insurers, except for any 2% interest payments attributable to insurer delay. Those interest payments must be paid by the insurer in respect of the delay occasioned during their respective responsibilities for handling the claim. Up until Zurich assumed handling of the claim, the delay is to be pinned on Chubb.

CONCLUSION

[77] I set aside the arbitrator's award and impose on the insurers an equal obligation to pay for Ms. Singh's SABS claim, apart from any 2% interest incorporated into the settlement with Ms. Singh. The compound interest is the only sanction applicable to this case that has a basis in the SABS legal framework. Since I was not provided the particulars of the payments made to date, including the settlement of the claim, I will leave it to counsel for the parties to calculate and adjust the financial consequences of my decision. They may contact me through my judicial assistant, at Melissa.Issa@ontario.ca, if they are unable to agree on the accounting.

[78] The amount of costs has been set by agreement in the amount of $15,000. I find that the overall result was divided because Chubb sought a complete reversal of the arbitral award including reimbursement of the amounts it paid to Ms. Singh after 2015. For that reason, I also hold that there be no costs of the appeal or of the arbitration below.

Akazaki J.
2024.05.23
16:57:35 -04'00'

Akazaki J.

Released: May 23, 2024

COURT FILE NO.: CV-22-00686871-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA
Appellant – and – ZURICH INSURANCE COMPANY Respondent

REASONS FOR JUDGMENT

Akazaki J.

Released: May 23, 2024