IN THE MATTER of the Insurance Act, R.S.O. 1990, c I.8, as amended, Section 268 and Regulation 283/95 made under the Insurance Act; AND IN THE MATTER of the Arbitration Act, 1991, S.O. 1991, c.I.7, as amended;

B E T W E E N:

ZURICH INSURANCE COMPANY

Applicant

and

CHUBB INSURANCE COMPANY OF CANADA

Respondent

AWARD

(Heard by the Honourable J. Douglas Cunningham, Q.C., on July 22, 2022)

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1. This arbitration involves a priority dispute between the parties as to which of them is responsible for the payment of statutory accident benefits to Sukhvinder (Susan) Singh who was involved in a single-vehicle accident on September 23, 2006.

2. The vehicle involved, a 1998 Ford Windstar, was rented by Ms. Singh from Wheels 4 Rent on September 22, 2006 and was returned damaged on September 25th.

3. Wheels 4 Rent had automobile liability coverage with the Applicant, Zurich Insurance Company ("Zurich"). As well, Wheels 4 Rent held an accidental death

and dismemberment policy with the Respondent, Chubb Insurance Company of Canada ("Chubb") which was available to its customers for purchase when vehicles were rented. Ms. Singh did not avail herself of that option. The broker that sold both policies to Wheels 4 Rent was Baird MacGregor.

4. Following the discovery by Wheels 4 Rent of the damaged vehicle, according to the evidence of Alex Fridman, the manager of the subject Wheels 4 Rent location, unsuccessful efforts were made to contact Ms. Singh by telephone.

5. Mr. Fridman, determining this to be a single-vehicle accident, completed a New Accident Report dated September 26, 2006 which was submitted to McLarens Canada, its adjusters, as a "Records Only" claim, because Wheels 4 Rent did not have property damage coverage in its policy with Zurich. As well, at the time, Wheels 4 Rent was unaware of any injuries that might have resulted from this accident.

6. In his Report, Mr Fridman wrote: "Vehicle was dropped off at our premises. We've got no further information regarding what happened. Supposedly it was no third party involved. We could not get hold of the renter." That is the extent of the information provided to McLarens in the fax of September 26, 2006.

7. At some point, in the fall of 2006, Ms. Singh decided to pursue a claim for accident benefits because, at the time, she was having back, shoulder and arm pain. Because, as she states in her affidavit of August 5, 2014, Chubb's name was prominently displayed at the Wheels 4 Rent location, she submitted her OCF-1 dated October 30, 2006, to Chubb. She was unaware at the time that Wheels 4 Rent had a policy of insurance with Zurich. She retained a lawyer, Murray Tkatch, to assist her.

8. On November 6, 2006, Mr. Tkatch wrote a letter to Wheels 4 Rent Corporate Headquarters identifying his client and indicating the date of loss as September 23, 2006. As well, he provided the licence plate number for the vehicle involved. He did not provide the rental location but requested that Wheels 4 Rent provide him with

insurance particulars regarding the vehicle involved and further advised he had been in contact with "your insurer" Chubb who had advised they had no report of the accident.

9. By letter dated November 7, 2006, Ernest Weintraub, the President of Wheels 4 Rent responded to Mr. Tkatch writing: "In reply to your letter of November 6 last, we have not received any accident report regarding the involvement of that vehicle whatsoever. Therefore, we are not obliged to release any information." Following receipt of that letter, Mr. Tkatch submitted the OCF-1 to Chubb on November 9, 2006.

10. Chubb denied Ms. Singh's claim in a letter to Mr. Tkatch dated November 21, 2006 in which the Claims Examiner wrote: "This is not a personal automobile policy and thus the coverage of Ontario Statutory Accident Benefits does not apply."

11. Although Chubb appears to have retained counsel at that time, no actual file was opened at Chubb until sometime in June 2007. Evidently, no claim for accident benefits was set up because there was no accident benefits policy. It was Chubb's position that it couldn't be responsible for statutory accident benefits because it was not an insurer for the purpose of the SABS. There was no policy to which they could attach an AB claim.

12. Accordingly, in spite of having received the OCF-1, Chubb declined to pay accident benefits to Ms. Singh. In fact, it would appear that Chubb did not investigate this matter, nor did they put Zurich on notice because of their position that Ontario Regulation 283/95 did not apply to them.

13. Finally, by letter to Mr. Tkatch dated May 28, 2008, Chubb's counsel advised that Wheels 4 Rent's automobile insurer was, in fact, Zurich. In early June 2008, for the first time, Zurich became aware of Ms. Singh's accident benefits claim.

14. Once Zurich was made aware of this claim, on a without-prejudice basis, pending the outcome of a priority dispute with Chubb, which it initiated, it agreed to start adjusting Ms. Singh's claim.

15. A priority arbitration was conducted by the late Stanley Tessis and in his decision of March 13, 2012, Mr. Tessis found that Chubb was not an insurer under section 268 of the Insurance Act because it had not issued a motor vehicle liability policy for the Wheels 4 Rent vehicle involved in the September 23, 2006 accident. In the arbitrator's view, there was no nexus between Chubb and Ms. Singh which would have engaged s. 2 of Regulation 283/95.

16. The decision of the arbitrator was appealed to a single judge of the Superior Court and in a decision dated November 13, 2012, Goldstein J. concluded there was a sufficient nexus between them that was, although perhaps remote, not arbitrary. Goldstein J. reiterated the objectives of the legislation, namely the provision of benefits in a timely manner and later sorting out issues of priority.

17. The matter then proceeded to the Court of Appeal where a majority concluded the application judge had erred in concluding that the Chubb policy was a motor vehicle liability policy and restored the decision of the arbitrator at first instance.

18. In a thoughtful dissent, Juriansz J.A. disagreed with the majority. Applying the nexus test, he concluded there was indeed a nexus between Ms. Singh and Chubb and that her mistaken belief that Chubb insured Wheels 4 Rent "could not be described as completely arbitrary." He, as well, reiterated the overriding public policy of the Regulations – "to provide timely delivery of benefits to all persons injured in car accidents in Ontario…", inconvenient as that might be to insurance companies who would later have to sort out priorities.

19. Zurich appealed and the matter proceeded to the Supreme Court of Canada which, in very brief reasons, *Zurich Insurance Co. v. Chubb Insurance Co. of*

Canada, 2015 SCC 19 accepted the reasons of Juriansz JA and allowed Zurich's appeal.

20. Following the decision of the Supreme Court, Chubb took over the adjusting and paying of benefits to Ms. Singh who by that time had become catastrophically impaired. By then, as earlier noted, Zurich had been paying these benefits to Ms. Singh since 2012. 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.

21. In a perfect world, and in accordance with Ontario Regulation 283/95 section 2.1 (6) the first insurer receiving a completed OCF-1 application will pay accident benefits in accordance with the SABs. The insurer, receiving the OCF-1 application, would assume the responsibility for adjusting and paying appropriate accident benefits. That insurer would then have 90 days to determine whether another insurer or insurers should be liable under s. 268 of the Insurance Act. If it determined another insurer or insurers ought to be responsible then within 90 days of receipt of a completed application for benefits, it would be obliged to provide written notice to the other insurer or insurers pursuant to s. 3.1 of Regulation 283/95.

22. This notice may be given after the 90-day period so long as the provisions of s. 3.2 are met. The other given, here, in accordance with the dissent of Juriansz JA, as adopted by the Supreme Court, is that Zurich was the motor vehicle liability insurer of Wheels 4 Rent and that Chubb was not. All that was determined by the Supreme Court was that a sufficient nexus existed between Chubb and Ms. Singh requiring it to pay accident benefits to her.

23. The first issue to consider is whether Wheels 4 Rent/McLarens/Baird MacGregor/Zurich should be deemed to have received a completed application for benefits in November 2006. In that regard, I return to the letter of November 6, 2006 from Mr. Tkatch to Mr. Weintraub at Wheels 4 Rent. That letter sought insurance

information regarding the subject vehicle and there can be no question, Wheels 4 Rent had an obligation under the *Insurance Act* to provide such information.

24. I have carefully reviewed the evidence of Ernest Weintraub who was examined under oath on June 25, 2019. Mr. Weintraub acknowledged he prepared a New Accident Report dated September 27, 2006, attached to which was the Accident Report completed by Mr. Fridman. This was a Records Only Report, meaning that Wheels 4 Rent was simply reporting that one of its vehicles had been damaged but that no claim was being submitted. I should note that the face page of this report, prepared by Mr. Weintraub, contained an incorrect licence plate number for the subject vehicle.

25. The Accident Report itself, prepared by Mr. Fridman, did contain the correct plate number. Importantly, this accident report apparently faxed to McLarens made no reference to any injuries resulting from the accident, nor did it suggest the accident was suspicious.

26. While Mr. Fridman may have had his own suspicions, his report simply stated that this was a minor single-vehicle accident resulting in damage he estimated to be $300. No photographs of the damage accompanied the report. That is the entirety of what was reported to McLarens.

27. Scott Mastromatteo was examined under oath on June 14, 2019. At the time of Ms. Singh's accident, he was an adjuster at McLarens. In his evidence, he stated he first became aware of Ms. Singh's claim for accident benefits in June 2008. At that time a letter was received by McLarens from Ms. Singh's lawyer, Mr. Tkatch, in which he advised that Chubb had denied Ms. Singh's AB claim and that the claim should be the responsibility of Wheels 4 Rent's automobile insurer, Zurich.

28. This had come to Mr. Tkatch's attention when he received a letter from Chubb's counsel dated May 28, 2008 in which it advised that Wheels 4 Rent was insured by Zurich and identified the Policy number. Mr. Mastromatteo had no

recollection of having received the New Accident Report from Mr. Weintraub but speculated, because it was records only, it would simply have been filed with no further adjusting steps required to be undertaken.

29. In June 2008, upon being advised by Mr. Tkatch that Zurich was the insurer, McLarens referred the matter to Zurich, which for the first time became aware of the claim. Mr. Mastromatteo was involved in adjusting the claims from June 2008 until he was advised by Zurich in October 2011 that it would be taking over the file. During his involvement in the file, Mr. Mastromatteo, in his evidence, said he worked towards gathering information in order to understand the claim that had been advanced to Chubb in 2006.

30. I conclude there was nothing McLarens received from Wheels 4 Rent that would have required them to do anything other than what they did based upon the New Accident Report submitted by Mr. Weintraub.

31. I return now to the November 6, 2006 letter from Mr. Tkatch to Wheels 4 Rent. I agree with the position of Chubb that if McLarens had received a copy of that letter, it would have had a duty to report it to Zurich. In other words, receipt of that letter by McLarens would be deemed to be receipt by Zurich.

32. Mr. Weintraub was examined extensively about that letter and his response of November 7, 2006. I should note that there is nothing in the record before me to indicate McLarens ever received a copy of that letter. Indeed, Mr. Mastromatteo swore he was seeing the letter for the first time at his examination under oath.

33. When questioned about what he might have done with Mr. Tkatch's letter, apart from responding to it, the best Mr. Weintraub could say was: "I don't ignore lawyers, and second, if I get anything like that, I would usually pass it on to McLarens."

34. When asked how he might have looked up this rental when he received Mr. Tkatch's letter, he responded he would have looked for the licence plate number and

the date of loss. He had no actual memory of what he did 13 years earlier. As far as any obligation to provide insurance particulars, all he could say was that he reported the loss to the adjusters.

35. On the basis of the evidence before me, I cannot conclude or even infer that Mr. Weintraub ever forwarded Mr. Tkatch's letter of November 6, 2006 to McLarens or that McLarens ever received such a letter. Mr. Weintraub may have looked for an accident report before he responded to Mr. Tkatch, but he simply had no memory of what he might have done other than being able to confirm, when shown it, that he responded to Mr. Tkatch on November 7, 2006. Had McLarens ever been alerted by Wheels 4 Rent that this accident was suspicious or questionable, it would have been required to take further action vis-à-vis Zurich.

36. I agree with Willie Handler, the insurance expert proferred by Chubb when in his Report of March 31, 2022 he wrote:

> …Wheels 4 Rent was unable to reach their renter of the damaged vehicle and, therefore, unable to confirm whether anyone was injured in the accident, whether another vehicle was damaged in the accident, and whether the total damage was over $1,000.
> I accept the statements made by Mr. Weintraub and Mr. Mastromatteo that it was common for vehicle rental customers to drop off damaged vehicles and not respond to telephone calls. Therefore, until November, there was no reason to suspect an accident claim was forthcoming.

37. As Mr. Handler corrected in the addendum to his Report, the fax from Mr. Weintraub to McLarens did not contain an application for accident benefits. I accept the evidence of Mr. Mastromatteo that had he received the faxed accident report from Mr. Weintraub, in all likelihood his acknowledgement would have been by way of telephone call to Mr. Weintraub with whom he had a business relationship.

38. There is no evidence that McLarens ever received a copy of Mr. Tkatch's November 6, 2006 letter to Mr. Weintraub (to Gerry Weintraub, not Ernest Weintraub, the President of Wheels 4 Rent). We do know that Ernest Weintraub in

his letter to Mr. Tkatch dated November 7, 2006 refused to provide the insurance information requested because he had no record of an accident report. This, Mr. Handler correctly opines, was a violation of section 269 of the *Insurance Act*. Mr. Tkatch's November 6th letter makes no reference to a claim for accident benefits or indeed any claim whatsoever. It simply requests insurance information for the vehicle with licence plate ARMZ598 in which his client was involved in an accident. The letter also indicates that Mr. Tkatch has been in touch with Chubb, the insurer of Wheels 4 Rent which advised him that no accident had been reported to them.

39. On November 9, 2006, Mr. Tkatch, based upon information received from his client, submitted to Chubb an Application for Accident Benefits (OCF-1) signed by Ms. Singh on October 30, 2006, obviously believing Chubb to be the appropriate insurer.

40. There can be no doubt that had Mr. Weintraub simply responded to Mr. Tkatch's November 6 letter by advising that Zurich, not Chubb, was Wheels 4 Rent's liability insurer, the matter might well have concluded much sooner. The OCF-1 would then have been submitted to Zurich which would then have had the obligation to investigate, adjust and pay any appropriate accident benefits.

41. As it turned out, however, Zurich was only made aware of Ms. Singh's accident benefits claims when Mr. Tkatch wrote to McLarens on June 3, 2008, advising Chubb had taken the position that its policy with Wheels 4 Rent was not a motor vehicle liability policy, and that Zurich was the automobile insurer. As a result of being so informed by its adjusters, McLarens, Zurich on a without-prejudice basis, pending the outcome of a priority dispute with Chubb, undertook to adjust and pay Ms. Singh's accident benefits. On April 23, 2009, Zurich commenced a priority dispute with Chubb by way of a Demand to Submit to Arbitration.

42. It should be noted that although prior to the September 23, 2006 accident, Ms. Singh had suffered pre-existing mental health issues, any accident benefits claim in

the fall of 2006 would have been modest. Unfortunately, by 2009, Ms. Singh's condition began to worsen such that eventually she was determined to be catastrophically impaired. From 2009 onwards, her condition deteriorated markedly.

43. On the basis of the record before me, nothing that could be considered an accident benefits claim ever made its way to Zurich until sometime after June 3, 2008 when Mr. Tkatch wrote to McLarens having learned that Zurich, in fact, was Wheels 4 Rent's motor vehicle liability insurer. While Mr. Handler is critical of Zurich's claims program in 2006, too much time had passed and too many memories have faded for me to make a determination of Zurich's claims handling procedures in 2006.

44. What I do conclude is that McLarens never received an application for accident benefits in November 2006, or anything that would have caused them to act in accordance with the Regulation. Mr. Handler was mistaken in his initial report that Mr. Tkatch's November 6, 2006 letter contained such an application and he corrected that in an addendum to this report.

45. Nevertheless, much of Mr. Handler's criticism of Zurich (McLarens) is premised upon the notion that McLarens received an accident benefits claim from Mr. Tkatch and failed to act upon it as Zurich's agent. There is no evidence before me of any other communications between Mr. Weintraub and McLarens in November 2006, beyond Mr. Weintraub's submittal of the "Records Only" claim to McLarens.

46. It should also be pointed out that because of Chubb's denial of her accident benefits claim, Ms. Singh had FSCO conduct a mediation with Chubb which failed. She then applied for mediation with Zurich. However, FSCO rejected her application as she had applied to Chubb for accident benefits first.

47. I turn now to Chubb and its handling of Ms. Singh's accident benefits claim. As noted, after the receipt of this claim, by way of Mr. Tkatch's November 9, 2006

letter, Chubb denied the claim in a letter to her lawyer dated November 21, 2006. As previously noted, Chubb retained counsel at that time.

48. It occurs to me that any experienced insurance counsel being made aware of such a claim, and being informed that no automobile liability policy existed, would recognize the client's obligation to pay the benefits and dispute priority later. Even if one believed no nexus existed, clearly an investigation of the circumstances would have revealed a reasonable nexus between Chubb and Ms. Singh.

49. Taking the position it had no responsibility to pay her accident benefits pursuant to Ontario Regulation 283/95, Chubb could easily have determined the identity of Wheels 4 Rent's automobile liability insurer. As counsel for Zurich has pointed out, Chubb and Zurich shared the same broker, Baird MacGregor. Not until May 28, 2009 did Chubb advise Ms. Singh that the automobile insurer of Wheels 4 Rent was, in fact, Zurich. It is Zurich's position that for 18 months from the time it received Ms. Singh's OCF-1, Chubb was in breach of its obligations under Regulation 283/95.

50. Zurich, having agreed to take over the adjusting and payment of Ms. Singh's accident benefits, now seeks reimbursement from Chubb for the amount it paid, totalling $998,368.99 plus pre and post judgment interest. Had Chubb stepped in when it ought to have, Zurich argues, Ms. Singh's condition would not have so significantly deteriorated such that the cost of accident benefits would have been greatly reduced.

51. Chubb, on the other hand, takes the position that because the Supreme Court of Canada confirmed Chubb did not insure the loss, Zurich is the priority insurer as the only insurer providing coverage under s. 268 of the *Insurance Act*. It seeks to be reimbursed its out-of-pocket expense of $1,537,229.04 representing amounts it paid to Ms. Singh as accident benefits.

52. Chubb also points out that although Zurich undertook in 2009 to adjust and pay Ms. Singh's accident benefits, it didn't begin to make these payments until 2012. I recognize one doesn't begin to make payments immediately and that various examinations are required as part of the adjusting process. Nevertheless, the letters from Mr. Mastromatteo dated August 4 and October 24, 2011 to Ms. Singh's service provider, rejecting payment because Zurich was not the first insurer to be notified of a claim are troubling, given Zurich's without prejudice agreement with Chubb in April 2009.

53. What the Supreme Court of Canada did, in its brief reasons, was simply to adopt the dissenting opinion of Juriansz JA who found there to be a non-arbitrary nexus between Chubb and Ms. Singh for the purposes of Ontario Regulation 283/95 and its underlying policy.

54. I understand what the majority in the Court of Appeal were getting at in introducing the concept of "non-motor vehicle liability insurer." However, I agree with Juriansz JA that to go down that road would have caused mischief as adjudicators in the future would "struggle in determining whether an insurer is a 'non-motor vehicle liability insurer.'" Chubb regularly writes motor vehicle liability policies in Ontario, and therefore Chubb could never be described as a "non-motor vehicle liability insurer."

55. Juriansz JA was clear: Zurich was the motor vehicle liability insurer of Wheels 4 Rent and Chubb was not. However, even though Ms. Singh mistakenly believed it was Chubb, her choice to send the OCF-1 to Chubb was not random or arbitrary. Accordingly, for the purposes of the Regulation and in the spirit of the overriding public policy of getting benefits to injured persons quickly, Chubb was obliged to pay and presumably seek reimbursement later from the correct insurer.

56. As was pointed out so clearly in *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* (2007) ONCA 62 "… only in the most extreme cases where the connection with the insurers is totally arbitrary should the insurer refuse to pay."

57. I have little difficulty concluding that Chubb was the first insurer to receive Ms. Singh's application for accident benefits. It should have begun investigating, adjusting and paying her appropriate benefits. It did not and Ms. Singh, who had pre-existing mental health issues, deteriorated dramatically. Pursuant to s. 3(1) of Ontario Regulation 283/95, in order for an insurer to dispute its obligation to pay benefits under s. 268 of the *Insurance Act*, it must provide written notice within 90 days of receipt of a completed application for benefits to every insurer it claims is required to pay.

58. In the present case, Chubb received the completed OCF-1 on November 17, 2006. Apart from its obligation to pay those benefits, it was incumbent upon Chubb to investigate the situation, try to discover who the liability insurer(s) was, and to then put that insurer(s) on notice. It did none of that. Even assuming 90 days was insufficient, there is no evidence that Chubb did anything other than deny Ms. Singh's accident benefits claim. Chubb is not saved by s. 3(2) of the Regulation.

59. Only when the Supreme Court allowed Zurich's appeal in April 2015 did Chubb begin paying accident benefits after Zurich had been paying them since 2012.

60. In the circumstances of this case, I cannot conclude that Zurich deflected this claim to Chubb. Neither Zurich nor its adjuster had any knowledge of an accident benefits claim in the fall of 2006. There was never, as required by s. 32 of the SABs, any notification to Zurich either directly or through its agent adjuster that Ms. Singh was pursuing a claim for accident benefits. On the other hand, Chubb, upon receipt of Ms. Singh's OCF-1, as an underwriter of automobile liability insurance in Ontario, had an obligation to provide her with appropriate application forms. It did

not do that. Chubb, had it wished to do so, could easily have determined who the proper liability insurer was and then put that company on notice.

61. As already noted, although Chubb did not insure this loss through a policy of insurance, it was, for the purposes of Ontario Regulation 283/95, an "insurer" under Section 268 of the *Insurance Act*. Apart from the fact that Chubb at the time underwrote automobile insurance policies in Ontario, a modicum of investigation would have revealed the existence and advertising of Chubb's optional death and dismemberment policy at Wheels 4 Rent.

62. This did not create some random or arbitrary nexus and in any event, if Chubb believed that to be the case, it ought to have made inquiries to determine who indeed was Wheels 4 Rent's actual auto liability insurer.

63. As to the impact of Chubb failing to give notice within 90 days, let alone its failure to investigate at all, several cases are instructive, given Zurich's argument that Chubb ought to be entirely responsible for the payment of Ms. Singh's accident benefits.

64. The decision of the Supreme Court, adopting the dissenting reasons of Juransz JA only dealt with the issue of nexus. It did not, nor did the decision of Goldstein J at first instance require Chubb to indemnify Zurich until priority could be determined, nor did it require Chubb to pay benefits permanently. Those issues, clearly, were to be determined in the priority dispute which is now before me.

65. Chubb argues that because it did not insure the loss, it could not be the priority insurer. As already noted, Juransz JA found that Zurich was the motor vehicle liability insurer of Wheels 4 Rent and that Chubb was not.

66. In *Kingsway General Insurance Company v. Ontario* (2007) ONCA 62, a pedestrian was struck by a vehicle insured by Kingsway. However, that policy had been cancelled two days before the accident. Kingsway denied benefits and the

pedestrian claimed against the MVACF which then paid the benefits and pursued Kingsway in a priority dispute.

67. Although the arbitrator found that Kingsway had deflected the claim and ordered it to pay benefits permanently on appeal to the Superior Court, Dambrot J. held that the arbitrator failed to deal with the issue of whether Kingsway was an insurer at the time of the accident and although agreeing that Kingsway ought to pay benefits pending a priority dispute, he remitted the matter back to the arbitrator to make that determination.

68. On further appeal to the Court of Appeal, the court agreed with Dambrot J in concluding that the arbitrator failed to determine whether Kingsway was an insurer at the time of his accident and in remitting it back to the arbitration. I do note, however, the comment of Laskin JA at paragraph 22:

> What remedy should be imposed for Kingsway's breach? It is tempting to agree with the remedy the arbitrator imposed: require Kingsway to pay … accident benefits regardless of whether it was an insurer at the time of the accident.

69. In *Wawanesa Mutual Insurance Company v. Lombard Canada* (2010) ONCA 383, the Court of Appeal, in an appeal of the decision of Beloboha J, confirmed the court's decision in Kingsway General as being determinative. As the arbitrator in Wawanesa concluded, Wawanesa deflected the AB application (on the basis that there was no policy in place at the time of the accident) and therefore could not assert that Lombard should be prevented from disputing its obligation to pay benefits simply because it failed to provide proper notice within 90 days.

70. The present case is somewhat different in that I have concluded Zurich did not deflect Ms. Singh's claim. If it had done so, the weight of authority seems to be that a failure of the disputing insurer to give notice within 90 days is not a bar to having priority determined. Quoting the arbitrator in that case, the Court agreed

that while a breach of the s.2 notice requirement is a serious matter, it does not automatically mean that the breaching insurer is required to pay accident benefits permanently.

71. Here, there can be little doubt that Chubb was not an insurer of this loss. Nevertheless, it did have an obligation under the pay now, dispute later regime to pay Ms. Singh's benefits. The question I must determine is whether Chubb, by essentially ignoring her application, taking no steps to investigate who the proper insurer was and failing to give any notice at all, let alone within 90 days, ought to be sanctioned.

72. I recognize what the courts have said about the failure to provide notice as mandated by section 3(2)(a) of Ontario Regulation 283/95 as not automatically determining that the breaching insurer should be obliged to pay benefits permanently. However, when I consider section 3(2), it is clear there must be a reasonable investigation to determine whether another insurer should be liable, and here there wasn't. So what are the consequences of that?

73. Section 283/95 s. 2(1) could not be more clear. The first insurer to receive a completed application for benefits is responsible for paying those benefits pending a resolution of any dispute as to which insurer has the obligation. A completed application is a completed and signed OCF-1 application such as the one Ms. Singh submitted to Chubb. There was no other such application here. The insurer first receiving a completed OCF-1 application is the "first insurer" under s. 2(1) for the purpose of the Regulations and may not refuse to respond.

74. Chubb was the "first insurer" here and it failed its obligation to pay. Moreover, as already noted, it failed its obligation to investigate and notify the insurer it believed should be responsible within 3 months or indeed at all. These failures must not go unsanctioned.

75. In that regard, I consider some cases on point. In *Kingsway General Insurance Co v. West Wawanosh Insurance Co*. 53 0R(3rd) 251, Sharpe JA said this:

> [10] The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.
>
> [13] I would also reject the submission that a court should exercise any general discretion it might have to grant the appellant relief from forfeiture for its failure to provide the required 90-day notice. Despite Mr. Samis' skilful and forceful argument that the respondent was aware of the appellant's intention to dispute liability, had conducted the required investigation and would suffer no prejudice if required to engage in the arbitration, I do not think that this is a case in which the court's discretion comes into play. I agree with the conclusion of the Superior Court judge that the Regulation provides a scheme that contemplates extensions of the 90-day notice period in certain circumstances, and that, by implication, any general discretion a court might have to grant extensions in other circumstances is excluded.
>
> [14] I also agree with the Superior Court judge that a change in the case law interpreting the liability of insurers does not constitute a factor justifying extension of the 90-day notice period under s. 3(2). As the Superior Court judge observed, this is an area in which there is a constant and steady flow of case law and arbitral decisions interpreting the law. Given the nature of these disputes and the disputants, as I have said, the dominant consideration must be clarity and certainty to ensure a predictable and efficient scheme of dispute resolution. In the present case, the appellant was able to conduct an investigation and make the

> determination that it was primarily liable. Having made that determination, it decided not to dispute liability. It follows, in my view, that the appellant cannot now argue that 90 days was not a sufficient period of time to make its determination.

76. In *Lombard Canada Limited v. Royal and Sun Alliance Insurance Company* at 2008 case 94 OR(3rd) 62, Strathy J (as he then was), dealt with a situation where the claimant, a passenger, was catastrophically injured in a motor vehicle accident. The car in which he was riding had been insured by Lombard. However, two months before the accident, the policy had been cancelled.

77. Lombard, the first insurer to receive a completed application for accident benefits, denied the claim. After eventually discovering that the driver was listed under a policy issued to his employer by Royal and Sun Alliance, Lombard put Royal and Sun Alliance on notice and the matter proceeded to arbitration where the arbitrator ruled there was a sufficient nexus between Lombard and the claimant, thereby triggering an obligation on Lombard to pay benefits pending the priority dispute.

78. The arbitrator then found that Lombard did very little, if anything, during the initial 90-day period to determine whether another insurer might be responsible. Accordingly, Lombard was ordered to pay the claimant's accident benefits permanently, even though Royal and Sun Alliance had the only valid policy covering the claimant at the time of the accident.

79. Strathy J, after considering the decision of the arbitrator and the statutory accident benefits scheme, concluded the arbitrator was correct and dismissed Lombard's appeal. In his consideration of the 90-day notice process in s. 3 of the Regulation 283/95, Strathy J concluded Lombard was not saved by s. 3(2)(c) in that it had failed to show that any reasonable investigations had been made within the 90-day period to determine whether another insurer should be responsible.

80. Similar to the situation before me where Chubb argues that it was not an "insurer" because no contract of insurance existed, because Lombard first received the application and because a sufficient nexus existed, it was obliged to pay accident benefits.

81. Strathy J also considered the *Kingsway* case, to which I have already made reference, where the policy had been cancelled 2 days before the accident giving rise to the accident benefits claim. It would appear Strathy J picked up on the comments of Laskin JA in that case as to the essential purpose of the legislation and his temptation to agree that benefits should be the obligation permanently of the breaching insurer.

82. In the case before Strathy J, Lombard only began an investigation 9 months after receiving notice of the AB claim. Strathy J as well carefully considered the commentary of Sharpe JA in *Kingsway v. West Wawanosh* to which I have already referred. In the result, Strathy J, agreeing with the arbitrator, stated:

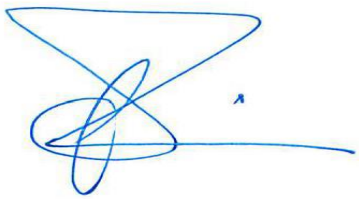
> In my view, there is much to be said for an inflexible rule that an insurer who fails to pay benefits and fails to put other insurers on notice, on receipt of an application, with which there is some nexus, should be found permanently responsible for the claimant's benefits. This promotes compliance 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 s. 3(2).

83. One sees a steady trajectory in the reasoning from Sharpe JA in *West Wawanosh* to Laskin JA in *Kingsway* to Sharpe J 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.

84. Accordingly, Zurich's claim is allowed. I conclude, in the circumstances of this case, that Chubb should be the one responsible for the payment of Ms. Singh's accident benefits permanently. As a result, Zurich is entitled to be reimbursed the sum of $998,368.99 plus appropriate prejudgment interest. Chubb shall also be responsible for Zurich's costs of the arbitration, including the costs of the arbitrator.

Dated at Toronto, this 5th day of August, 2022.



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The Honourable J. Douglas Cunningham, Q.C.