IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended

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

AND IN THE MATTER OF an Arbitration

B E T W E E N:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and –

AXA INSURANCE

Respondent

REASONS FOR DECISION ON INTERIM MOTION

Scott W. Densem – Arbitrator

Heard: November 18, 2010

Counsel:

Kevin D. H. Mitchell for the Applicant

Thomas R. Hughes for the Respondent

Introduction

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

Wawanesa brought a motion seeking an interim Order requiring AXA to adjust Mr. Rampersaud's claim for SABS and to pay appropriate SABS to Mr. Rampersaud pending a final determination of the priority issue in this arbitration.

The Motion was argued before me on November 18, 2010. I have set out herein my decision and reasons for decision in respect of Wawanesa's motion.

Evidence and Documents Submitted on the Motion

I have considered the following evidence and documents submitted to me on the Motion:

1. Factum of the Moving Party, the Applicant (Wawanesa);

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

3. *Andriano v. Wawansa Mutual Insurance Company and Republic Western Insurance*, decision on a preliminary issue FSCO Arbitrator Robert A. Kominar, August 31, 2007, submitted by Wawanesa.

4. Factum of the Respondent (AXA);

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

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

In addition to the documentation referred to above I heard oral submissions from counsel for Wawanesa and counsel for AXA.

Facts

Preadeep Rampersaud was involved in an accident on December 13, 2009. He was an occupant of a 1997 GMC vehicle. Mr. Rampersaud's vehicle was struck by a vehicle insured by AXA under policy number PER003942586.[1]

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

Mr. Rampersaud was also a named insured under Wawanesa policy number 7878195. Subject to the impact of other issues to be discussed in these reasons, the Mercury policy would be higher in priority to the Wawanesa policy 7878195 by operation of section 268 (5.2) of the *Insurance Act.*

[1] Barneveld Affidavit, paragraphs 2,3
[2] Bradbury Affidavit, paragraph 8, Exhibit B.

Mr. Rampersaud has sought payment of SABS through a paralegal representative. It is common ground between the parties that payment of SABS was sought first from the Mercury Insurance Company of Florida. [3]

Issue

I have been asked to make an interim determination as to which of Wawanesa and AXA should be responsible to pay SABS to Mr. Rampersaud, pending a final determination of the priority issue in this arbitration.

After a careful consideration of the material submitted to me by counsel (itemized above), and counsels' submissions, it seems to me that to decide this matter on an interim basis involves a consideration of the very same facts and law that would be relevant to a final determination of the priority dispute.

Positions of the Parties

Wawanesa's position can be summarized as follows:

- The Mercury Insurance Company of Florida is not a licensed Ontario insurer, nor has it filed the Power of Attorney and Undertaking (PAU) with the Superintendent of Insurance that would effectively require it to pay SABS in accordance with Ontario law.
- SABS must be paid by an insurer who has issued a "contract" of Automobile Insurance. By operation of Section 224 (1), "contract" is defined as a contract of automobile insurance that is undertaken by a licensed Ontario insurer, an insurer

[3] Bradbury Affidavit, paragraph 16, Barneveld Affidavit, paragraph 4

from another province, or an insurer in the United States that has filed the PAU. Therefore, Mercury Insurance Company of Florida is not required to pay SABS in the circumstances.

- AXA received an application for SABS from Mr. Rampersaud's representative with a May 12, 2010 letter. AXA is an Ontario licensed Insurer and had in force at the time of Mr. Rampersaud's accident a valid policy of motor vehicle liability insurance in favour of one Sue Watson, who was the operator of the automobile involved in the accident with Mr. Rampersaud giving rise to his claim for SABS. Subject to SABS priority rules, there is no question that AXA would have an obligation to pay SABS to Mr. Rampersaud.
- The provisions of the Ontario Regulation 283/95-Dispute Between Insurers set out a complete code for how the payment of SABS is to be initiated and for determining priority disputes between insurers. Based on the foregoing, and by operation of Section 2 of Regulation 283/95, AXA was the first insurer to receive a completed application for SABS and was therefore responsible to pay SABS to Mr. Rampersaud pending the resolution of any priority dispute.
- AXA did not pay SABS to Mr. Rampersaud. Instead, it took the position that Mr. Rampersaud should seek benefits from Mercury Insurance Company of Florida, and then later deflected the claim to Wawanesa who did have a policy under which Mr. Rampersaud was a named insured.
- Wawanesa argues that AXA should have started paying SABS to Mr. Rampersaud and if it had wished to dispute its priority to make payment with either Mercury Insurance Company of Florida or Wawanesa, it ought to have put

both of those companies on notice pursuant to Section 3 of Regulation 283/95. Not only did AXA not pay benefits to Mr. Rampersaud, but it also failed to serve any Notice of Dispute Between Insurers on either Mercury Insurance Company of Florida or Wawanesa. Since there is no question that AXA is an insurer who would, by operation of Section 268 of the insurance Act, have an obligation to pay SABS, and since it has failed to take any steps to dispute the priority of that obligation with Mercury Insurance Company of Florida and Wawanesa, AXA is responsible to pay SABS.

AXA's position can be summarized as follows:

- In its Factum AXA submitted that Wawanesa's interim motion was effectively an application seeking the payment of interim benefits for the benefit of Mr. Rampersaud. AXA submits that only FSCO has the jurisdiction to determine such an issue, not a private arbitrator under Regulation 283/95. AXA did not actively pursue this argument in its oral submissions and conceded that an arbitrator acting under Regulation 283/95 does have jurisdiction to decide priority between Insurers on an interim basis.
- AXA argued in its factum that the interim relief sought by Wawanesa was in effect akin to injunctive relief being sought on an interlocutory basis and therefore the test for injunctive relief should apply. That test requires that there be a serious issue to be tried (AXA concedes this), that there be a irreparable harm suffered should an interim award not be made (AXA disputes this), and that the

harm be suffered by the moving party (AXA disputes this as it would be Mr. Rampersaud who would suffer harm, not Wawanesa should interim benefits be denied).

- AXA takes the position that the Mercury Casualty Company, which has filed a PAU, is the parent company of the Mercury Insurance Company of Florida. Therefore, as a subsidiary corporation, AXA argues that the PAU filed by the parent company should bind the Mercury Insurance Company of Florida. The effect of this would be that Mercury Insurance Company of Florida would have an obligation to pay SABS because it was the first insurer to whom an application for SABS was submitted. It is common ground that Mercury Insurance Company of Florida declined to pay SABS. Since Mr. Rampersaud's representative next sought SABS from AXA, it was not the first insurer to receive an application for SABS and therefore the regulatory scheme set out in 283/95 does not apply.
- In any event, since Mercury Insurance Company of Florida is presently not a party to this arbitration it would be inappropriate to make an interim order dealing with the issue only between AXA and Wawanesa because Mercury Insurance Company of Florida could be the highest priority insurer.
- AXA submits that the case law indicates a priority dispute must be determined on its merits. An arbitrator cannot find that an insurer who has not complied with Section 2 of Regulation of 283/95 thereby becomes responsible to pay SABS on a permanent basis. AXA argues that Wawanesa would be higher in priority to AXA under Section 268 because Mr. Rampersaud was a named insured on

Wawanesa's policy. Therefore, as between AXA and Wawanesa, Wawanesa should be required to pay SABS.

Analysis

I will first address the issue of jurisdiction and whether the fact that this matter is being dealt with a preliminary issue or on an interim basis has any effect on the legal standards to be applied. I am of the opinion that I do have jurisdiction to decide the issue that has been put before me. I am not being asked to determine whether Mr. Rampersaud is entitled to the payment of SABS. What is before me is a simple priority dispute where I am being asked to decide which of two insurers has the higher priority for the payment of any SABS to which Mr. Rampersaud may be found entitled. There is no clear evidence before me as yet as to what the status of Mr. Rampersaud's claim for SABS may be, but in their submissions both counsel advised that they are unaware of any proceedings having been commenced by Mr. Rampersaud against either of their companies. In any event, should there be a dispute now or in the future as to Mr. Rampersaud's entitlement to SABS then of course the proper forum for that dispute would be FSCO.

Wawanesa has brought this motion for an interim award on the priority issue because it has a concern that it, as well as AXA, could come under unfavourable scrutiny by FSCO if reasonable efforts are not made to make sure that either Wawanesa or AXA responds to Mr. Rampersaud's SABS claims pending an ultimate determination of a priority dispute. Indeed that is the entire objective of the 283/95 Regulatory scheme - to get SABS payments flowing to a claimant in need in spite of any dispute between insurers as to which of them has the higher priority to pay.

In my opinion, the fact that an interim award is being sought does not change the legal analysis of the issues that an arbitrator must undertake. I see no basis for applying the legal test for interlocutory injunctions in deciding an insurance priority issue. I would say again that the issue before me is not whether Mr. Rampersaud is or is not entitled to receive SABS. The result in this arbitration either on an interim or final basis will only decide which insurer has the highest obligation to pay whatever SABS to which Mr. Rampersaud may be found entitled. Therefore, the interlocutory injunction test, particularly the concept of "irreparable harm", is not relevant to the issue that I must decide.

I will next address the issue concerning the status of Mercury Insurance Company of Florida and how that impacts the priority dispute. I have been asked to rule on an interim basis, based on the evidence counsel have put before me so far, as to whether Wawanesa or AXA has the highest priority obligation to pay SABS. I have just outlined the importance and time sensitive need to have a determination of an insurer who should respond to Mr. Rampersaud's SABS claims. I do not think it would be appropriate to defer a decision on the relative priority of the Wawanesa and AXA until such time as Mercury Insurance Company of Florida becomes a party to this arbitration. There is no guarantee that Mercury will become a party to this arbitration and if it is not an "insurer", then it would not be a proper party in any event. My jurisdiction is limited to deciding which of Wawanesa or AXA have the highest priority to pay SABS since they are the only parties who have agreed to submit to arbitration before me pursuant to the regulatory scheme. As will become apparent from my reasons *infra*, even if I decided that Mercury Insurance Company of Florida has an obligation to pay SABS because of

the PAU filed by the Mercury Casualty Company, I believe that I would still have to determine which of Wawanesa and AXA has the highest priority for the payment of SABS. In any event, the fact that Mercury Insurance Company of Florida is not a party to this arbitration does not impact my decision. For the reasons which follow I have concluded that, on the evidence before me, Mercury Insurance Company of Florida is not an Ontario Licensed Insurer nor is there a PAU filed with the Superintendent of Insurance that is binding upon it.

Various documents have been put into evidence regarding the status of Mercury Insurance Company of Florida. I find that the most informative document is the excerpt from Mercury General Corporation's Annual report which forms part of its United States Security and Exchange Commission filings for 2009.[4]

This document clearly identifies Mercury General Corporation as an insurance holding company with several subsidiaries. It also identifies Mercury General as the parent of its subsidiary, Mercury Casualty Company based in California. Listed amongst the subsidiaries identified in the annual report is Mercury Insurance Company of Florida. In my opinion this document indicates that Mercury Casualty Company and Mercury Insurance Company of Florida are subsidiaries of Mercury General Corporation which is their parent company. AXA has asserted that Mercury General Corporation is the successor to the Mercury Casualty Company originally incorporated in 1961. In support of this assertion in Mr. Barneveld's Affidavit at paragraph 12 there is reference to documents marked Exhibit K. These documents are 2010 corporate filings for Mercury Insurance Company of Florida and for a company called Mercury Insurance

[4] Tab G Affidavit of John Bradbury sworn November 6, 2010, Attachment to November 10, 2010 letter from Zarek Taylor Grossman Hanrahan

Group Inc. with a mailing address in South Carolina. I do not believe that these documents support the assertion that the Mercury General Corporation is the successor to the Mercury Casualty Company, nor have I been able to find in any of the other corporate documents submitted, evidence to suggest that Mercury General Corporation is a successor to Mercury Casualty Company.

AXA has also submitted that the Mercury Casualty Company is the parent company of Mercury Insurance Company of Florida. For that assertion it relies upon the 2009 Securities and Exchange Commission filings and the annual report (page 2). Like the assertion that Mercury General Corporation is the successor company to Mercury Casualty Company, I am of the opinion that this argument is similarly unfounded. The documents clearly indicate that Mercury General Corporation is the parent of Mercury Casualty Company which is one of Mercury General's 21 subsidiary companies. Mercury Insurance Company of Florida is shown as a separate subsidiary. This document in no way indicates that Mercury Insurance Company of Florida is the subsidiary of Mercury Casualty Company.

In summary, based on the evidence before me I conclude that the Mercury Casualty Company was the first of many insurance companies established using the Mercury name. It was started in 1961 in California. The Mercury brand appears to have grown successfully in California and then expanded into other parts of the United States over the years. At some point a parent or holding company was set up called Mercury General Corporation. The corporate structure seems to be that there are various insurance companies throughout the United States bearing the Mercury name and these are all subsidiaries of the holding company, Mercury General Corporation.

It is not entirely clear to me what the status of the “Mercury Insurance Group” may be. There does appear to be a company that has been incorporated in South Carolina called the Mercury Insurance Group, Inc. There is certainly no indication that this company is one and the same as Mercury General Corporation, or that it has any control over the Mercury Insurance Company of Florida or the Mercury Casualty Company. Perhaps the Mercury Insurance Group is simply a trade style of the Mercury Insurance Group Inc. It is possible that the Mercury group of companies in the south eastern United States is somehow connected under the auspices of the Mercury Insurance Group but I certainly do not have any evidence before me to make that finding.

I am satisfied on the evidence however that only the Mercury Casualty Company of California has filed the PAU with the Ontario Superintendent of Insurance. There is insufficient evidence before me to suggest that there is any type of corporate relationship that would bind the Mercury Insurance Company of Florida to the PAU filed by the Mercury Casualty Company of California. If additional evidence in that regard is brought forward at a later date I will of course consider it. For now, on the evidence before me I find that the Mercury Insurance Company of Florida is not a licensed Ontario insurer, it has not filed its own PAU, and it is not covered by the PAU filed by the Mercury Casualty Company in California.

I will go further in saying that if I am incorrect in my conclusions with respect to the status of the Mercury Insurance Company of Florida, I do not regard those conclusions as essential to determine the priority issue as between Wawanesa and AXA. That is because even if Mercury Insurance Company of Florida was bound by the

PAU filed by the Mercury Casualty Company, AXA should have followed the statutory scheme in regulation 283/95 to dispute priority. When AXA was presented with Mr. Rampersaud's application for SABS, as an insurer of a vehicle involved in the accident with Mr. Rampersaud it had an obligation to start paying appropriate SABS. If it wished to take the position that the Mercury Insurance Company of Florida had a higher priority obligation to pay SABS then it ought to have served a Notice of Dispute Between Insurers on Mercury Insurance Company of Florida and, if so advised, upon Wawanesa. AXA did neither. Instead of adjusting Mr. Rampersuad's claim for SABS while conducting a priority investigation, AXA declined to process Mr. Rampersaud's SABS application and appears to have deflected the application to Wawanesa after first attempting to direct the claimant to Mercury Insurance Company of Florida.[5]

Three and a half months went by during which presumably AXA discovered that Mr. Rampersaud was insured with Wawanesa. It is not clear from the evidence whether AXA actually directed Mr. Rampersaud's representative to approach Wawanesa for the payment of SABs. What is clear however, is that AXA did not process Mr. Rampersaud's claim for SABS when it was received back in the middle of May, 2010. It simply undertook an investigation to see if there was a higher priority insurer. That is not how the regulatory scheme in Section 283/95 is intended to operate. The rationale for the system is well described by Laskin, J.A., in *Kingsway General Insurance Company v. Ontario (Minister of Finance)*[6]

> Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies Section 2 is that the first insurer to

[5] Tab I, Affidavit of John Bradbury, Sworn November 6, 2010
[6] 84 O.R. (3d) 507

> receive an application for benefits must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay…

Wawanesa subsequently received a SABS application from Mr. Rampersaud's representative at the end of August, 2010. Wawanesa disputed its priority to pay SABS by serving AXA with a Notice of Dispute Between Insurers. It is that Notice which forms the basis for this arbitration. Although Wawanesa followed the scheme to that degree the evidence indicates that, like AXA, Wawanesa also did not process Mr. Rampersaud's application for SABS taking the position that it would not do so until the priority issue with AXA was sorted out. Again, this is not how the system is intended to work. Even if AXA's position was ultimately found to be in error or that it had improperly deflected the SABS claim to Wawanesa, Wawanesa ought to have processed Mr. Rampersaud's SABS application and then followed up on its priority dispute with AXA. Like AXA, other than an argument that it was not the priority insurer because of AXA's handling of the matter, it was nevertheless still a Section 268 insurer in that Mr. Rampersaud was a named insured under a policy issued by Wawanesa at the time of the accident.

There is no dispute on the evidence that AXA did not serve a Notice of Dispute Between Insurers on Wawanesa within 90 days of its receipt of Mr. Rampersaud's SABS application. Indeed, the evidence is that no notice was ever served by AXA to dispute priority with Wawanesa. No evidence has been introduced on this motion to support a Regulation 285/95 Section 3(2) argument that 90 days was an insufficient

period of time for AXA to determine whether other insurers ought to be put on notice. There is evidence that AXA intended to conduct an investigation into the priority issue shortly after receiving Mr. Rampersaud's SABS application but the extent of that investigation is not clear. I do note that at tab M of the Affidavit of John Bradbury there is a letter from the claimant's representative to Wawanesa dated September 9, 2010. The letter indicates that in late May 2010, the claimant's representative advised AXA about "priority coverage" for Mr. Rampersaud with Wawanesa, including details of the Wawanesa policy number.

Since the 283/95 Section 3 issue was not explored in either written or oral argument on this motion I am not foreclosing the introduction of further evidence on that issue by either party for the final determination of the arbitration issue. For the purposes of making an interim decision as to which of AXA or Wawanesa should pay SABS to Mr. Rampersaud, I conclude that AXA did not serve a Notice of Dispute Between Insurers on Wawanesa within 90 days of receiving Mr. Rampersaud's SABS application and there is currently no evidence to suggest that such a Notice should be permitted after the 90 day period.

AXA has argued on this motion that even if there has been a breach of 283/95 section 2, the priority dispute must still be determined on its merits and an insurer in breach of the Section is not required to pay SABS indefinitely. In support of that submission AXA relies upon *Kingsway General Insurance Company v. Ontario (Minister of Finance*) and *Wawanesa Mutual Insurance Company v. Lombard Canada* [7]

[7] See note, 2010 ONCA 383

The significant point of distinction for this case from both of the cases upon which AXA relies is that in the Kingsway and Wawanesa cases one of the issues to be resolved to determine the priority dispute on the merits involved deciding whether the first insurer to receive a SABS application held the status of an insurer when the application was received. A critical issue in those cases involved determining whether the first insurer to receive the application (Kingsway in the first case and Wawanesa in the second case) had properly cancelled their policies prior to the accident thus removing any ultimate legal obligation to pay SABS.

That is not the situation in the case before me. Subject to determining priority, both AXA and Wawanesa properly concede that they held the status of insurers at the time of the accident. AXA had that status because it insured the person involved in the accident with Mr. Rampersaud. Wawanesa held the status of insurer because Mr. Rampersaud was a named insured on a policy of insurance issued by Wawanesa in force at the time of the accident. Here both insurers had a legal obligation under section 268 to pay SABS, subject only to their being a higher priority insurer determined in accordance with regulation 283/95.

In my opinion the most important *ratio* to take from these cases is that the "pay first-dispute later" procedure mandated by regulation 283/95 is paramount to the effective operation of the SABS delivery system. Justice Laskin makes it clear in the Kingsway case that even where an insurer may have an absolute legal defence to a claim for the payment of SABS (i.e. it can prove it validly cancelled its policy before the accident) it still must follow the section 283/95 procedure. If presented with a SABS application it must pay and then follow the dispute rules to contest the issue.

I also think it would be an excessively technical reading of 283/95 Section 2 for the second or subsequent insurer receiving an application who has, to use the words of the case law, some “nexus” with the claimant, to refuse to pay SABS on the grounds that the 283/95 pay and dispute rules did not apply because it was not the “first” insurer to receive an application. To interpret the regulation this way would in many cases defeat its “pay now and dispute later” purpose. In my opinion, an insurer with a nexus to the claimant that receives a SABS application should follow the procedure in regulation 283/95, relying upon the priority dispute resolution process to address a priority issue or improper claims handling by an insurer who had received and deflected an earlier SABS application.

In summary, I am of the opinion that when AXA received Mr. Rampersaud’s SABs application it ought to have processed the application with a view to making appropriate payments, while exercising its right to dispute priority with any other insurer or insurers its investigation revealed may have had a higher priority obligation to pay.

On the evidence before me, I do not believe that Mercury Insurance Company of Florida was an insurer responsible to pay SABS to Mr. Rampersaud. Even if that finding is incorrect, I find that AXA, as an insurer who, subject to priority, would have an obligation to pay SABS, should have responded to Mr. Rampersaud’s application and followed the priority dispute procedures with respect to Mercury Insurance Company of Florida and Wawanesa to have the issue determined.

Subject to receiving further evidence on the 283/95 section 3, 90 day issue, I find that it is AXA’s responsibility to pay appropriate SABS to Mr. Rampersaud.

The 90 day issue could become very important because if new evidence before me or an appellate finding determines that the Mercury Insurance Company of Florida is an insurer, both Mercury and Wawawnesa could be higher in priority to AXA. Mr. Rampersaud was a named insured on the Mercury policy and he was an occupant of the vehicle at the time of the accident. Wawanesa, but for the 283/95 section 2 and 3 issues, would be the insurer with the second highest priority since Mr. Rampersaud was a named insured under its policy.

Taking this into account, counsel for both parties may wish to lead further evidence and make submissions on the 283/95 section 2 and 3 issues in the event that these could have an effect on the ultimate determination of the priority dispute.

Conclusion

For the foregoing reasons, on an interim basis, subject to a final determination of the priority issue after any further evidence and submissions are received, I find that AXA Insurance is responsible to pay SABS to the claimant, Mr. Rampersaud.

For the reasons I have outlined concerning my view that both AXA and Wawanesa had an obligation to respond to Mr. Rampersaud's SABS claim and then follow the rules set out in 283/95 to have the priority issue determined I am inclined to award no costs of the motion. I will formally reserve my decision however until counsel have had an opportunity to make submissions on costs should they wish to do so.

Dated at Toronto this day of May, 2011

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Scott Densem, Arbitrator