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

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

**AND IN THE MATTER OF an Arbitration**

BETWEEN:

**AVIVA INSURANCE**

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE ("THE MOTOR VEHICLE ACCIDENT CLAIMS FUND")**

Respondent

# AWARD

**Written Submissions: September and October, 2020**

Counsel:

Jessica L. J. Rogers for the Applicant, Aviva Canada Inc. ("Aviva")

Todd M. Wasserman for the respondent, the Motor Vehicle Accident Claims Fund

SCOTT W. DENSEM: ARBITRATOR

**Introduction**

This Award follows arbitration of an insurers' priority dispute pursuant to Ontario Regulation 283/95 under the *Insurance Act*. The dispute concerns ultimate responsibility for the payment of Statutory Accident Benefits ("SABS") paid or payable to Richard Gosselin and Carly Egan ("the claimants") as a result of a motor vehicle accident occurring November 13, 2015.

The claimants initially applied to the Respondent ("the Fund") for SABS. The Fund commenced handling the claims and investigated to determine whether there was another insurer in priority to the Fund. Since the Fund is the payor of last resort, any insurer with valid SABS coverage is in priority to the Fund under section 268 (2) of the *Insurance Act*.

As a result of its investigation, the Fund concluded that the Applicant ("Aviva") insured the vehicle involved in the accident, so it served a Notice of Dispute between Insurers ("NDBI") on Aviva. Several communications ensued between agents and/or counsel for the Fund and Aviva which will be reviewed in detail in the Analysis section of this Award. Aviva also conducted its own investigation with respect to priority.

Following these communications, Aviva advised the Fund that it would accept priority for the payment of SABS to the claimants and take over claims handling responsibilities from the Fund.

Sometime after accepting priority for the SABS claims, Aviva determined that it did not insure the vehicle involved in the accident and sought to withdraw its acceptance

of priority. The Fund refused to agree to Aviva withdrawing its acceptance of priority, and this arbitration followed.

The arbitration was conducted pursuant to a May 8, 2018 terms of appointment that I sent to counsel. It was also part of the terms of the parties' agreement to arbitrate that either party could appeal my Award, without leave, on an issue of law, or mixed fact and law.

**Issues**

The primary issue is which of Aviva or the Fund has ultimate priority for the payment of SABS to the claimants?

Priority will be determined by whether Aviva is or is not permitted to withdraw its acceptance of priority for the payment of the SABS claims.

**Evidence**

The evidence in this case was introduced in written form. I was provided with a Compendium consisting of an Agreed Statement of Facts and 41 tabs of documents the parties agreed to submit into evidence. Aviva prepared and submitted a Book of Authorities which functioned as a joint brief of authorities. These were referred to by both Aviva and the Fund in their Facta (including reply submissions on behalf of Aviva).

**Analysis**

This case involves a contentious issue in the world of priority dispute arbitration between insurers – under what circumstances should an insurer be permitted to

withdraw an unequivocal agreement to accept priority for a SABS claim from another insurer?

The Facts

The Fund received the first SABS application on behalf of Carly Egan on November 24, 2015. Ms. Egan's representatives submitted a letter dated November 19, 2015 with the SABS application they filed with the Fund. The letter advised that the claimant, Carly Egan, was a passenger in an uninsured vehicle driven by Richard Gosselin (aka Richard Sitzes). Mr. Gosselin's representatives subsequently applied to the Fund on his behalf for SABS in January, 2016.

The Fund instructed its adjusters, Claimspro, to begin handling the claim, and to investigate whether there was any insurance coverage on the vehicle involved in the accident.

The investigation by Claimspro generated the following documents and information:

- Vehicle Ownership search, November 25, 2015.

This search confirmed that Oliver Sitzes was the owner of several vehicles, including the 2003 Dodge Neon SX which was involved in the accident. It also confirmed that Oliver Sitzes leased a 2002 Chevrolet Venture van. The name of the lessor was not indicated.

- Telephone discussion with Egan's counsel and follow-up email December 2 and 3, 2015.

These confirmed that the claimants were occupants of the 2003 Dodge Neon SX at the time of the accident. The 2003 Dodge was owned by Oliver Sitzes. It was suggested that he might also have owned a van.

- Autoplus Gold Search, December 3, 2015.

This search confirmed that Western Assurance had insured the 2003 Dodge Neon, and the 2002 Chevrolet Venture van under a policy issued to Oliver Sitzes, but that the policy insuring these vehicles had been cancelled effective April, 2015. The search did not indicate which vehicle was owned, and which was leased.

- Police Accident Report, received by Claimspro on or about January 7, 2016.

The police report confirms that the vehicle involved in the accident was the 2003 Dodge Neon owned by Oliver Sitzes.

- Western Assurance letter, January 8, 2016.

Western Assurance sent this letter to Claimspro after being served with an NDBI. It confirmed the cancellation of the policy in April, 2015, and enclosed copies of the registered letters of cancellation to Oliver Sitzes and to Lynmar Auto Sales Limited ("Lynmar").

- Signed statement from Carly Egan, January 18, 2016.

The statement asserted that Oliver Sitzes owned the 2003 Dodge and a van. It confirmed Oliver Sitzes died in January, 2015.

- Western Assurance communication, June 8, 2016.

Claimspro file notes indicate that Claimspro had received proof of delivery of the registered letters of cancellation from Western.

- Telephone discussion between Claimspro and Lynmar, June 8, 2016.

Claimspro file notes record this conversation as follows:

Jun 8, 2016 02:49PM VCL (Phone Call): PC to Silvie of Lynmar Auto Sales Limited (T) 519-491-8210

- confirmed that the vehicle was leased
- They have liability coverage through Aviva
- She will email their broker to speak to us

The Agreed Statement of Facts states (at paragraphs 40 – 43):

Claimspro in its conversation with Lynmar made reference to the Neon. Lynmar advised that they maintained a Contingent Lease Holder Insurance Policy SPF-8 and that their insurer was Aviva. Lynmar advised Claimspro that 'the vehicle' was leased.

- Telephone discussion between Claimspro and Lynmar's Insurance broker, All-Risks, June 8, 2016.

Claimspro file notes record this conversation as follows:

Jun 8, 2016 02:49PM VCL (Phone Call): PC broker, Deb at All Risks (T) 519-683-4884

- advs of our involvement

- There appears to be coverage under the Aviva SPF8 pol 70028822, policyholder is Lynmar Auto Sales limitited *(sic)*

Subsequent to these telephone conversations with Lynmar and All-Risks, Claimspro served NDBIs on Aviva with respect to the SABS claim of Carly Egan and Richard Gosselin.

The NDBIs identify Aviva's insured as Lynmar Auto Sales Limited "*(lessor of the involved vehicle)*" (Arbitrator's emphasis). This was an innocent misrepresentation of fact by Claimspro. It would later be determined by both Aviva and the Fund that Lynmar was not the lessor of the "involved vehicle", it was the lessor of the 2002 Chevrolet Venture van.

In response to Aviva's several letters requesting proof that Lynmar insured the vehicle involved in the accident, Claimspro repeatedly asserted that Lynmar was the lessor of the vehicle involved in the accident in its July 14, 2016, July 26, 2016, and December 6, 2016 letters to Aviva.

Claimspro served a Notice to Commence Arbitration on December 13, 2016. After that, further discussion of priority issues was handled by the Fund's counsel.

During its handling of the priority matter, Claimspro not only repeatedly innocently misrepresented the facts to Aviva, it also failed to provide Aviva with the Vehicle Owner search. This was an important document which indicated Oliver Sitzes owned the 2003 Dodge Neon, and leased the 2002 Chevrolet Venture van.

The Agreed Statement of Facts, and Aviva's file notes indicate that Aviva's own priority investigation was limited. After being served with the NDBI asserting that

Lynmar was the lessor of the vehicle involved in the accident, on June 23, 2016 Aviva contacted All-Risks. All-Risks' information was inconclusive. All-Risks could not confirm which vehicles were covered by Lynmar's policy with Aviva.

Aviva's file notes indicate that after this contact with All-Risks, Aviva telephoned Claimspro. Aviva's note indicates that Aviva was told that Claimspro had contacted All-Risks on June 8, 2016.

None of Claimspro's file notes, Aviva's file notes, or the Agreed Statement of Facts indicates that Claimspro ever told Aviva that Lynmar was the source of Claimspro's information identifying Lynmar as the lessor of the vehicle involved in the accident.

Aviva's priority communications changed after it received an April 28, 2017 letter from the Fund's counsel. Up to that point, Aviva had continuously requested better evidence of the assertion that Lynmar leased the vehicle involved in the accident. None had been forthcoming in any of the letters Aviva had received from Claimspro or in the first letter Aviva received from the Fund's counsel (April 4, 2017). These communications repeatedly advanced the unsupported statement that Lynmar was the lessor of the vehicle involved in the accident.

The April 28, 2017 letter from the Fund's counsel to Aviva provided evidence for the assertion however; and the source of the evidence was identified as Aviva's own insured Lynmar.

It is evident to me that Aviva relied upon the contents of the April 28, 2017 letter from the Fund's counsel because its subsequent priority requests were limited to getting

proof that the Western policy had been properly cancelled. As soon as Aviva was satisfied about this, it accepted priority.

The facts show that the Fund's agents repeatedly misrepresented to Aviva, albeit innocently, that Lynmar had leased the vehicle involved in the accident. Aviva relied on those misrepresentations to accept priority once Lynmar was identified as the source of the assertion that Lynmar had leased the vehicle involved in the accident. The facts also support the conclusion that the Fund's agents caused both Aviva and the Fund to enter into an agreement based on a mistake about a fundamental term of the agreement – whether Aviva insured the vehicle involved in the accident. Had the parties been aware of the correct facts they would have realized that Aviva could not have any legal responsibility for the payment of SABS to the claimants and there never would have been an agreement.

The Law

For the purposes of applying the law, the facts of this case are virtually identical to the facts of the Award authored by me and referenced as *HMQ v. Echelon*, August 29, 2017. This Award deals extensively with the law applicable to the withdrawal of agreements to accept SABS priority.

My decision was appealed to the Superior Court of Justice, and subsequently to the Ontario Court of Appeal. It was upheld in both Courts (*Ontario (Minister of Finance) v. Echelon General Insurance Company*, 2018 ONSC 4550, *Ontario (Finance) v. Echelon General Insurance Company*, 2019, ONCA 629). In my opinion the Court of

Appeal decision supports my analysis as to how the law should be applied to fact situations like this priority dispute involving Aviva and the Fund.

I will try to briefly summarize the *ratio* of my decision in *HMQ v. Echelon* to lay a foundation for my discussion of the law here. For a detailed examination of the reasons for my conclusions in *HMQ v. Echelon*, I would invite interested parties to read my Award, with the caveat that the Court of Appeal described it euphemistically as "lengthy".

The balance of my discussion of the law will focus mainly on the Court of Appeal's decision considering my Award, and the recent case which the Fund relies upon for its position in this arbitration, *Pembridge Insurance Company v. the Sovereign General Insurance Company* (Arbitrator Shari Novick, November 9, 2018, 2019 ONSC 7291) ("*Pembridge v. Sovereign*"). I will also discuss the Award of Arbitrator Lee Samis in *TD Home & Auto Insurance Company v. Markel Insurance Company of Canada*, August 24, 2012 ("*TD v. Markel*").

I have set out below the essential points of my Award in *HMQ v. Echelon.* I stand by my reasoning and, subject to the partial correction required by the Court of Appeal's decision, my statement of the law in that Award.

1) Regulation 283/95 has not occupied the field by mandating statutory terms and conditions governing the circumstances in which an insurer should be permitted to withdraw from an agreement to accept priority for a SABS claim from an insurer who seeks to transfer the responsibility for the SABS claim to the accepting insurer.

2) An arbitrator may apply the principles of equity or contract law in the appropriate case to permit an insurer who has accepted priority for the SABS claim to withdraw from the agreement.

3) The decision as to whether an insurer should be allowed to withdraw its agreement to accept priority for a SABS claim requires an examination of the facts in each case. It should be based on whether the facts support the application of relevant principles of equity or contract law which would allow the withdrawal. The circumstances in which an insurer may withdraw an agreement to accept priority are not limited to where the insurer seeking to transfer priority for the claim has acted in bad faith, or deliberately misled the insurer accepting priority.

In *Ontario (Finance) v. Echelon*, apart from a correction to the route I followed to achieve the result, The Court of Appeal concluded that the result was reasonable. It appears to me that The Court of Appeal endorsed my reasoning underlying the result.

The Court stated that I had construed section 7 (6) of Regulation 283/95 too narrowly in finding that it should be interpreted as providing for the imposition of a penalty such as costs sanctions, but not as a basis for the orders I made determining the merits of the dispute.

The Court of Appeal held that that section 7 (6) provides a complete remedy. It is not limited to allowing only costs or penalty type sanctions. The Court of Appeal stated:

> ...s. 7 (6) of the Regulation...permits an arbitrator to resolve the priority dispute by requiring an insurer to fully reimburse the Fund for benefits paid for which the insurer was properly responsible, in addition to the costs of the

investigation and legal fees, and ordering any sanctions the arbitrator might find to be warranted (paragraph 50).

It must be remembered that the precondition necessary to engage the special award provisions of section 7 (6) remedy is "*...the failure of an insurer other than the Fund to comply with section 2.1 or 3.1...*".

Section 2.1 is the "deflection" situation. Paraphrasing 2.1 (5), it states that an insurer shall not prevent a SABS applicant from submitting a completed SABS application or redirect the application to another insurer. It had no application to the facts in *HMQ v. Echelon*, or to the facts in this case.

Section 3.1 requires an insurer to complete a reasonable priority investigation, and provide the results of that investigation to the Fund before serving the Fund with an NDBI.

Section 7 (6) applied in *HMQ v. Echelon* because both Courts agreed with my finding that Echelon had not completed a reasonable investigation, and it had not provided the results of that investigation to the Fund before serving the Fund with an NDBI. Neither Section 3.1 nor Section 7 (6) applies in this case.

The question might then be asked, does the Court of Appeal decision in *Ontario (Finance) v. Echelon* provide any guidance with respect to how, if at all, equity and contract law principles should be applied to deal with cases involving the withdrawal of an agreement to accept priority apart from section 7 (6) cases involving the Fund?

On a strict *ratio decidendi* basis the Court of Appeal did not find it necessary to answer this question directly. Its decision was premised on the holding that the

complete solution to the particular fact situation before it was found in the application of section 7 (6) of Regulation 283/95.

The Court of Appeal spent several paragraphs of its decision however, analyzing the basis for my Award, and the decision of the Superior Court. The Court of Appeal specifically discussed the equitable and contract law principles upon which I had based my decision, and referenced my discussion of the arbitral case law regarding the circumstances in which an insurer should be permitted to withdraw an agreement to accept priority.

In addressing this analysis, the Court of Appeal only went as far as agreeing with both the Superior Court judge and myself in saying that the Fund's special position in the SABS priority structure, and the addition of section 3.1 amendments made any case law on the issue prior to the date of the amendments (September, 2010) inapplicable to the Fund.

The Court of Appeal cited the following reasoning from my Award however, and in my view, approved of it as a sound legal basis on the facts of the case for the result I arrived at.

> The arbitrator noted, at p. 54, that none of the cases involved the Fund or s. 3.1 of the Regulation. He added, at p. 55: "I am of the view that there is insufficient legal foundation for such a severe narrowing of the circumstances in which an insurer may withdraw an agreement to accept priority – especially considering the section 3.1 amendment to the priority dispute regulation for cases involving HMQ". (para 38).
>
> The arbitrator considered, at p. 61, whether it would be unjust to allow the Fund to withdraw its agreement to accept priority and to require Echelon to make

> restitution of monies paid by the Fund, "because Echelon detrimentally changed its position or its circumstances in reliance on HMQ's decision." He concluded, at p. 63, that there was no real prejudice to Echelon apart from having to pay, which was "simply the consequence of righting the wrong which ha[d] occurred, and essentially putting Echelon back in the position [of] priority insurer – a position in which it should have remained according to the facts and law of this case" (at para. 39).

In stating that I should have come to the result that I did using section 7(6), instead of taking "the long way around" the Court of Appeal concluded:

> ...the narrow reading of his authority under 7 (6) compelled the arbitrator to pursue the convoluted common law route to an effective remedy...While the arbitrator has jurisdiction under the Arbitration Act, 1991 to take that road, there was no need to do so in this case. This is the summary perspective within which an arbitration under the Regulation is intended to operate, as Sharpe J.A. noted in *West Wawanosh*. (at para. 48)

In my opinion the Court of Appeal's decision implicitly endorses the application of principles of equity and contract law by an arbitrator to permit the withdrawal of an agreement to accept priority in appropriate fact situations to be evaluated on a case by case basis.

Aviva's position in this arbitration is substantially in accord with the views I expressed in *HMQ v. Echelon* and which I have repeated here. I must address the Fund's position, which, with characteristic candour, the Fund's counsel has acknowledged is essentially the opposite of the position it advanced in *HMQ v. Echelon*.

The Fund submits in this case that in the interests of predictability and certainty for insurers (including the Fund) involved in priority disputes, there needs to be a settling of the test to be applied to cases involving withdrawal of agreements to accept

priority. The Fund submits that the most recent statement of the law is set out *Pembridge v. Sovereign.* The Fund submits that in *Pembridge v. Sovereign* the Superior Court upheld the Arbitrator who followed what I will describe for ease of reference as the "exceptional/extreme/limited/unusual circumstances" approach in declining to allow Pembridge to withdraw its agreement to accept priority.

The Fund notes that the judgment in *Pembridge v. Sovereign* was delivered after both the Superior Court decision and the Court of Appeal decision in *Ontario (Finance) v. Echelon*, and considers at least the Superior Court decision.

The Fund candidly submits that although it is possible to make reasonable arguments to support different approaches, the legal consensus leans toward the more restrictive approach. When coupled with the goal of certainty, it is the best approach for arbitrators to take in these cases.

The Fund submits that I should apply the restrictive approach to the facts in this case. I should conclude that the facts here do not rise to the level of exceptional (insert any of the other adjectives here) circumstances which would justify allowing Aviva to withdraw its acceptance of priority.

I certainly appreciate that predictability of outcomes for litigants in any forum is a laudable objective, and indeed it forms the basis for *stare decisis* – the principle that lower courts and tribunals are bound to follow pronouncements on the law from higher courts to promote consistency in the law.

On the other hand, there is also the trite but true legal adage that each case must be decided on its own facts. General statements of law that may apply in one case

cannot be applied *holus bolus* to another case if the facts are not the same. Different legal considerations may apply in those cases.

I would add to this the desirable objective that the law should be interpreted in such a way as to promote achieving the correct result between parties engaged in a dispute. Certainty or predictability in the law cannot, in my view, be allowed to ascend to dominance such that what is fair and right is eclipsed.

The need to balance these requirements is why, as Justice Nordheimer said in *Kingsway General Insurance v. West Wawanosh*, "*The law is frequently in a state of flux...(the arbitrator's decision) raises the thorny question as to when it can be said the law is clear.*" (para. 34).

I have read carefully both the arbitral and the Superior Court decisions in *Pembridge v. Sovereign*. In my opinion the facts of the case are significantly different and readily distinguishable from the facts of the present case. I do not consider myself bound by the Superior Court decision in *Pembridge v. Sovereign* to refuse to allow Aviva to withdraw its acceptance of priority in this case.

In *Pembridge v. Sovereign*, the SABS applicant was struck by a car insured by Sovereign. The broker for the claimant's parents who were insured by Pembridge contacted Pembridge about the accident. A claim was opened by Pembridge but Pembridge never received an actual SABS application. Sometime later, the claimant submitted a SABS application to Sovereign. In the course of conducting a routine priority investigation, the Sovereign adjuster learned *via* an Autoplus search that

Pembridge had an open claim in respect of the accident which, according to the search, pre-dated the receipt by Sovereign of the claimant's SABS application.

Sovereign served an NDBI on Pembridge (and other insurers) on January 31, 2015. Sovereign sent a letter with the NDBI. The letter and the NDBI stated

> ...in the event Pembridge received the Application for Accident Benefits (OCF1) prior to Sovereign General Insurance Company's receipt of it, onus would rest on (Pembridge) to handle this claim...as the first insurer to receive an application...(Pembridge) may be responsible for payment (of the claim) in the event that she is an insured under their policy. (*Arbitrator Densem's underlining*).

Approximately five days later on February 2, 2015, Pembridge wrote to Sovereign agreeing to accept priority for the claim. There had been no further communications between Pembridge and Sovereign before Pembridge accepted priority.

The evidence established that the Pembridge adjuster admitted he had made the decision to accept priority for the claim based on his own unfounded assumption that the claimant was a dependant of her parents. The Pembridge adjuster acknowledged that Sovereign had made no representations of any kind to him on the issue. His mistaken conclusion about the dependency issue was his, and his alone. It was in no way influenced by Sovereign.

It is also clear that the NDBI and letter, the only communications between Sovereign and Pembridge before Pembridge accepted priority, contained no misrepresentations of fact (or law). They simply stated possible conclusions based on possible fact scenarios. Unlike the Fund in this case, Sovereign did not categorically

assert the truth of a fact material to the determination of priority seeking to have Pembridge rely on the assertion to accept priority.

This is the first major point distinguishing *Pembridge v. Sovereign* from this case (or from *HMQ v. Echelon*). There were no misrepresentations of fact made by Sovereign to Pembridge which were relied upon for priority acceptance. There was no mutual mistake as to facts or law forming the basis for the acceptance of priority. This is a significant difference from this case (and from *HMQ v. Echelon*) where the acceptance of priority was founded upon mutual mistake, and repeated misrepresentations which were ultimately relied upon for the acceptance of priority.

The second major point of distinction is that in *Pembridge v. Sovereign* both insurers potentially had section 268 (2) priority. The issue was arguable throughout. Had Pembridge not accepted priority, it would have been decided in a contested proceeding. The parties would have been able to introduce competing evidence and legal arguments on the issues. The arbitrator would have determined priority after considering the evidence and the parties' legal arguments.

In this case, and in *HMQ v. Echelon*, the insurer accepting priority never could have had any section 268 (2) responsibility to pay SABS. Aviva could never have had a section 268 (2) obligation to pay SABS because it did not insure the vehicle involved in the accident. In *HMQ v. Echelon*, Echelon insured the snowmobile involved in the accident. Therefore, by application of the section 268 (2) priority hierarchy Echelon was indisputably a higher priority insurer than the Fund.

The only reason why Aviva in this case, or the Fund in *HMQ v. Echelon,* could be required to pay SABS is that they would not be permitted to withdraw an acceptance of priority. Their acceptance was premised on a mutual mistake of fact, with the added effect of reliance on repeated misrepresentations about the facts. These circumstances are entirely different from those in *Pembridge v. Sovereign*.

My Award in *HMQ v. Echelon* and the Superior Court appeal decision is mentioned in *Pembridge v. Sovereign*, so a brief comment about this is warranted.

The Arbitrator did not have the benefit of the Court of Appeal's decision in *Ontario (Finance) v. Echelon* when the Award was written. Further, the entire discussion of the priority withdrawal issue by the appellate Judge in the Superior Court was premised on the finding that the arbitration in *HMQ v Echelon* was *void ab initio* so he held that any discussion of case law, equity or contract was essentially irrelevant.

The *void ab initio* finding was rejected by the Court of Appeal. The Court of Appeal held that the arbitration was properly constituted. The findings and orders I made were valid, reasonable and "*contemplated by the Regulation.*" The Court of Appeal discussed the case law extensively, as well as my analysis based on equity and contract principles. The Court stated that taking the route I did produced an "*effective remedy*", but it was unnecessary because 7 (6) provided a complete solution. In my view this is at the very least an implicit acknowledgment that my analysis using equity and contract principles was reasonable based on the facts of the case. I am supported in this view by the fact the Court explicitly noted that an arbitrator has jurisdiction under the Arbitration Act 1991 "*...to take that road...*". (para. 48)

The Superior Court decision in *Pembridge v. Sovereign* decision was released in December, 2019. There is only a passing reference in it to the Superior Court decision in *Ontario (Minister of Finance) v. Echelon*, and no reference at all to the Court of Appeal decision, despite the fact that it was released in July, 2019. Perhaps it was not drawn to the Court's attention, or perhaps the Judge may not have adverted to it given these comments in the Arbitrator's Award:

> I understand that Echelon is seeking leave to appeal the above decision to the Court of Appeal. I am advised however, that the grounds of appeal are restricted to the judge's findings with regard to the role of the Fund in priority disputes, and its status as an "insurer". According it is not relevant to the issues before me. (para. 76)

Unfortunately the arbitrator was misinformed. Neither the grounds of appeal nor the Court of Appeal's decision were so restricted. The Court of Appeal dealt directly with the issue of whether the Fund should be permitted to withdraw its acceptance of priority as part of what it described as the *"overarching issue...whether responsibility for paying statutory accident benefits to Ms. Barnes rests with Echelon or the Fund."* (para. 5).

I do however find some of the comments by the Court in *Pembridge v. Sovereign* supportive of my view on how the issue of whether or not to permit an insurer to withdraw an agreement to accept priority should be decided.

In response to Pembridge's argument that express language in Regulation 283/95 would be required to prohibit an insurer withdrawing an agreement to accept priority, the Court stated:

> I do not read these cases (*the arbitration decisions on priority agreement withdrawal*) (or the arbitrator) to have imposed an absolute prohibition against the

> withdrawal of an agreement to accept priority. They allow for exceptions and recognize that each case must be determined on its own facts (*Arbitrator Densem's underlining*). See for example *Aviva Insurance Company of Canada v. State Farm Insurance Company* (2012), 2012 CarswellOnt 17684 (Arbitrator: Shari Novick, at pages 11-12). (para. 34)

This passage from Arbitrator Novick's decision in *Aviva v. State Farm* reads in part as follows:

> There may be circumstances in which incorrect information is communicated by a reliable third-party that an insurer relies on to accept priority, that is subsequently determined to be untrue. Each case must be determined on its own facts, but it seems that in those cases, the prejudice suffered by each party, if any, should be balanced against the need for efficiency and expediency in deciding whether a withdrawal of priority should be accepted.

I cited this passage in my Award in *HMQ v. Echelon*. I believe that my comment about it is equally appropriate for this case:

> ...this comment strikes me to be very much a statement of how, in a general sense, equitable principles and contract principles are applied in the appropriate case. (page 53).

I will conclude my discussion of the law with a review of the Award of Arbitrator Lee Samis in *TD v. Markel*. The facts, for the purposes of the issue in this case, are straightforward. After receiving a SABS application following an accident, Markel sent an NDBI to TD stating:

> The claimant is not a listed driver on our policy. He is a deemed named insured with TD Insurance.
>
> Therefore, the claimant is a named insured in respect to the TD Insurance policy, and only an occupant of a vehicle insured by Markel's policy.

After receiving the NDBI, TD accepted Markel's assertion that the claimant was not a specified driver on the Markel policy, and confirmed that its own policy covered the claimant. After doing so, TD advised Markel that it agreed to accept priority.

Sometime later it was discovered that Markel's statement that the claimant was not a specified driver on its policy was inaccurate. The claimant was a specified driver on Markel's policy. This status automatically placed Markel higher than TD in the 268 (2) priority hierarchy because the claimant had been an occupant of the Markel vehicle at the time of the accident.

TD sought to withdraw its agreement to accept priority, but Markel disputed TD's entitlement to do that, so arbitration ensued.

This case is often cited in support of the position that the consensus of the arbitral authorities mandates a very restrictive test to decide whether an insurer should be permitted to withdraw an agreement to accept priority. The relevant part of the Award in this regard reads as follows:

> I certainly agree with the proposition that insurers who formally take a position about a loss transfer or priority matter, should not be allowed to resile from that position simply because they discover some new fact or circumstance later in the process. It would be most unsatisfactory if insurers could accept responsibility lightly, and then change their position, perhaps repeatedly, with the evolution of their understanding of the case. (page 4)

What I consider important about this case however, is that notwithstanding the above comments, Arbitrator Samis ruled that TD should be permitted to withdraw its agreement to accept priority. The essence of his analysis is that because TD's acceptance of priority was induced by reliance on Markel's inaccurate representation of

fact about whether the claimant was a specified driver on the Markel policy, it would be unfair not to allow TD to withdraw its acceptance of priority.

As the Fund has done in this case, Markel argued that TD ought to have conducted a more thorough priority investigation before accepting priority. The comments made by Arbitrator Samis in rejecting that argument are, in my view, equally applicable in this case. The important part of his Award supporting his decision to permit TD to withdraw its acceptance of priority reads as follows:

> Markel has made various assertions that TD should have and could have conducted more extensive investigations before accepting priority. In a sense, Markel is arguing that TD should not have accepted the representations that Markel made to it. In the context of an intercompany dispute where one insurer has made an express representation about a material fact, which would be expected to be well known to the insurer making the representation, I do not think it is reasonably required for another insurer to make any further inquiry. It is entitled to accept the representation...(page 6)

The Fund acknowledged this case in its submissions. It noted that earlier arbitration Awards favouring a restrictive test for the withdrawal of an agreement to accept priority also seemed to allow for leniency where a "reliable third party" had provided incorrect information relied upon by an insurer to accept priority.

The Fund sought to distinguish the facts in the present case on the grounds that although Claimspro was an "honest" source, the information that it provided to Aviva should not have been considered "reliable" since it was based on hearsay from another source which Aviva knew to be inconclusive.

Here the Fund is referring to the information which Aviva had obtained from All-Risks which did not assist in determining whether Lynmar had leased the vehicle involved in the accident. The Fund submits that Aviva ought to have realized Claimspro's information attributed to All-Risks could not have been any better than Aviva's own information received from All-Risks, and investigated further.

The argument would be improved if the evidence established that Aviva had relied only upon Claimspro's unsupported assertions that Lynmar had leased the vehicle involved in the accident. Aviva did not base its acceptance of priority however, solely on these representations from Claimspro. Aviva continued to ask for documentary confirmation of Claimspro's assertion that Lynmar had leased the vehicle involved in the accident, even after it received the first letter from the Fund's counsel dated April 4, 2017.

It was only after receiving the April 28, 2017 letter from the Fund's counsel that Aviva accepted as accurate the assertion that Lynmar had leased the vehicle involved in the accident. In my opinion, the reason Aviva accepted this assertion as accurate then and not before is that a reliable source for the previously unsupported assertion had finally been confirmed. Lynmar was now identified as the source of the information that Lynmar had leased the vehicle involved in the accident.

I will accept that there is a distinction between the facts in this case, and the facts in *TD v. Markel*. TD relied upon information received directly from Markel about Markel's own policy. In this case the information that Aviva relied upon did not come to Aviva

directly from Lynmar. It was provided by the Fund's counsel as a statement of fact attributed to Lynmar by Claimspro.

I am not persuaded that this distinction is sufficient to conclude that it was unreasonable for Aviva to have considered the information reliable.

In my opinion, to determine whether reliance on information received from a particular source is reasonable, one must first determine whether the source has sufficient integrity to provide accurate information. In other words, the question should be asked, is it reasonable to trust this source?

Next, if the source has sufficient integrity to provide accurate information – *i.e.* can be trusted, then one must consider whether it would be reasonable to expect that the kind of information provided by the source could be accurately known by the source. Put another way, is there a reason to doubt the accuracy of the information the source is providing because it is unlikely that the source could have accurate knowledge of such information?

In this case, there is absolutely no doubt about the answer to the first part of the inquiry. Claimspro has been well known in the insurance industry for years. It is recognized as a competent and trustworthy claims handling company. The Fund's counsel are equally highly reputed, respected throughout the legal profession and the insurance industry, not to mention being officers of the court. It was eminently reasonable for Aviva to trust the source of the information it received in this case.

With respect to the second part of the inquiry, the information came from a reliable source, and it was attributed to a similarly reliable source – Aviva's own insured

Lynmar. There was nothing about the nature of the information that should have caused Aviva to question whether the Fund's counsel or Claimspro could accurately know it. This is especially true when considered in the context of Claimspro and the Fund's counsel reinforcing the alleged validity of the information by repeating it in several letters over many months.

The Fund argued that Aviva did not conduct a reasonable priority investigation *and* that its failure to do so should preclude Aviva being permitted to withdraw its agreement to accept priority.

I disagree. Whether or not Aviva's priority investigation was reasonable does not trump the impact of the misrepresentations of fact made by the Fund which induced Aviva to agree to accept priority.

The Fund itself submitted in *HMQ v. Echelon* (and I agreed), that the law governing this situation is as stated in *Barclays Bank v. Metcalfe v. Mansfield* (2011 ONSC 5008 (CanLII)):

> A material misrepresentation, whether innocent or fraudulent, may be grounds to set aside a contract entered into by one party in reliance on the representation...For innocent misrepresentation the representation might be entirely honest and careful, there is no need for promissory intention, the negligence of the party seeking relief is no defence (*Arbitrator Densem's underlining*), and there is a presumption that a material representation did in fact cause the misrepresentee to enter into the transaction. The presumption can be rebutted by proof of no reliance on the misrepresentation. (paragraph 156 ff.)

Aviva could have done a better job investigating priority in this case. An obvious line of inquiry after receiving inconclusive information from All-Risks about which

vehicles Lynmar leased and to whom would have been to contact Lynmar directly to try to get the answer from the definitive source. As the above statement of the law indicates however, whether or not Aviva's investigation was reasonable does not relieve the Fund of responsibility for making misrepresentations material to Aviva's decision to accept priority.

In any event, the Fund's priority investigation was equally deficient in this case, and the Fund is responsible for communicating incorrect information to Aviva which has ultimately led to this arbitration.

Given the contrary information in the documents generated by its investigation, Claimspro should have tried to obtain documentary evidence proving that Lynmar leased the vehicle involved in the accident. Claimspro could have asked Lynmar for a copy of the lease confirming that Lynmar leased the vehicle involved in the accident to Mr. Sitzes. Of course Lynmar could have refused to produce it, but Claimspro would have been perfectly within its rights to point out that Lynmar might have avoided a summons to an arbitration hearing in a priority dispute if it provided documentary proof of its ownership and lease of the vehicle involved in the accident.

Instead, Claimspro relied upon its understanding of a telephone conversation with Lynmar which, based on Claimspro's notes, was less than a minute in duration. Claimspro knew or should have known this understanding contradicted all of the documentary evidence it had in its file – particularly the Vehicle Owner search.

In response to repeated requests from Aviva for documentary proof that Lynmar leased the vehicle involved in the accident, Claimspro simply continued to advance the

unsupported assertion. The documents it provided to Aviva with the NDBI and subsequent correspondence did not connect Lynmar to the vehicle involved in the accident. In fact, Claimspro failed to provide Aviva with perhaps the most important document it had in its file from the beginning – the Vehicle Owner search.

This showed Oliver Sitzes to be the owner of the Dodge Neon, and the lessor of the Chevrolet Venture van. Although not necessarily conclusive, the search should have raised doubts, and caused Claimspro to seek documentary proof of its understanding from its telephone discussion with Lynmar. Aviva may have had reason to seek better evidence too, had Claimspro provided it with the Vehicle Owner search.

The evidence also indicates that Claimspro never told Aviva that Lynmar was the source of its information that Lynmar had leased the vehicle involved in the accident. Aviva did not know this until it received the April 28, 2017 letter from the Fund's counsel. Aviva had no reason to doubt the truthfulness of the assertion. This was not another unsupported statement, nor was it from a questionable source. It came from a source of the utmost integrity which attributed the information to Lynmar, the source which could be expected to know the correct facts.

This is not a situation where Aviva initiated the priority dispute with the Fund and had a subsection 3.1 (2) obligation to complete a reasonable investigation, and to provide the Fund with the results of that investigation before it could properly serve an NDBI on the Fund. Section 3.1 (2) does not apply in these circumstances.

Section 3.1 (2) has been described by the courts as designed to prevent insurers from lazily "dumping" a claim on the Fund without properly investigating the priority facts

to determine whether there is a reasonable basis for the claim. That legislative concern is not an issue in this case. Aviva is not attempting to "dump" a claim on the Fund when it would be inappropriate to do so. The claimants advanced their SABS claim to the Fund. It was the Fund which sought to have Aviva assume responsibility for the claims based on mistaken information communicated by the Fund and relied upon by Aviva. On a correct understanding of the facts, the claims were properly with the Fund and should remain there.

**Conclusion**

In *Kingsway v. West Wawanosh*, the Court of Appeal stated that the priority dispute system involves a limited number of insurers who are "sophisticated litigants" regularly involved in disputes with each other. "Clarity and certainty" of application of the provisions of Regulation 283/95 are of primary concern so that insurers can make proper claims handling decisions.

In my opinion, it is incumbent upon all the insurers involved in the priority dispute system to ensure that the system operates fairly, as well as efficiently. To that end, they should be able to trust and rely upon representations of fact they make to each other in any particular case, and be able to make timely claims handling decisions in reliance on those representations.

This requires more from the insurers than simply refraining from knowingly misrepresenting information to each other, or not acting in bad faith toward each other while conducting priority disputes.

An insurer who is presented with statements of fact by an insurer who is seeking to transfer responsibility for a SABS claim to it should be entitled to rely on the accuracy of the statements. If the insurer seeking to transfer responsibility for a SABS claim innocently misrepresents facts which are relied upon, or the parties enter into an agreement where they are mistaken about the facts fundamental to the agreement, then the agreement should be voidable at the option of the insurer who agreed to accept responsibility, and the parties should be restored to their original positions.

This is consistent with the principle of restitution in equity, or mutual mistake in the law of contract. These remedies are subject to the defences in equity and contract which I discussed in my Award in *HMQ v. Echelon*. The defences did not apply there, and there is no evidence that they would apply in this case.

This is how the principles of equity and contract law apply in virtually all circumstances where parties enter into agreements with each other. In the absence of statutory direction or binding common law authority to the contrary, I see no reason why the same principles should not be applied to agreements between insurers for the transfer of responsibility of SABS claims in appropriate circumstances.

I would reiterate the importance of a feature of this case which was also present in *HMQ v. Echelon*. But for its acceptance of priority based on mistake and misrepresentation of fact, Aviva could never have had any section 268 (2) responsibility to pay SABS in this case. The fact that it did not insure the vehicle involved in the accident means that it could never have properly been considered as a section 268 (2) priority insurer at all, let alone be higher in priority than the Fund.

In my opinion, if it is necessary to consider balancing the equities or the relative prejudice to the parties in deciding whether a party should be permitted to withdraw an agreement to accept priority, the facts of this case most definitely favour permitting Aviva to withdraw its agreement to accept priority.

**Disposition**

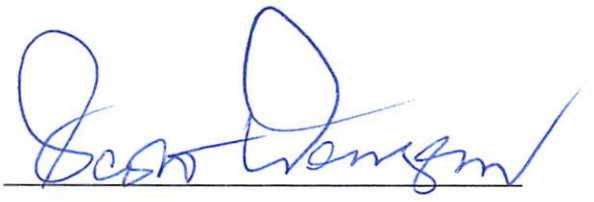
1) Aviva is permitted to withdraw from its agreement to accept priority for the SABS claims.

2) The Fund is the priority insurer pursuant to section 268 (2) of the *Insurance Act*, and, if the claims remain open, has the responsibility to continue handling the claimants' SABS claims.

3) Aviva is entitled to restitution from the Fund of any monies Aviva has paid to the Fund, and monies paid to or on behalf of the SABS claimants, if any.

4) Aviva, as the successful party in this arbitration, is entitled to recover its costs from the Fund, including its share of the Arbitrator's fees and disbursements already paid or payable.

Dated at Toronto, March 1, 2021



Arbitrator Scott W. Densem