IN THE MATTER OF THE *MOTOR VEHICLE ACCIDENT CLAIMS ACT*, R.S.O. 1990, c. M.41

AND IN THE MATTER OF AN ARBITRATION UNDER THE *ARBITRATION ACT, 1991,* S.O. 1991, c.17

AND IN THE MATTER OF A DISPUTE BETWEEN INSURERS UNDER O.REG. 283/95, AS AMENDED

MADE UNDER THE *INSURANCE ACT*, R.S.O. 1990, c.I.8

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE

Applicant

-and-

ECONOMICAL MUTUAL INSURANCE COMPANY and AVIVA INSURANCE COMPANY OF CANADA

Respondents

AWARD

Counsel:

Andrew Choi [not appearing on the consent of all parties]
Counsel for Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance ["HMTQ" or "The Fund" (Motor Vehicle Accident Claims Fund)]

Peter Durant
Counsel for the respondent, Economical Mutual Insurance Company ["Economical"]

James M. Brown
Counsel for the respondent, Aviva Insurance Company of Canada ["Aviva"]

Issue:

This arbitration arises by reason of a pedestrian - motor vehicle accident which occurred on October 10, 2019, and gives rise to a priority dispute amongst the Fund, Economical, and Aviva. It is agreed amongst all parties that the Fund cannot be found to have the highest priority to respond to this claim and while the Fund participated in all pre-arbitration and mid-arbitration teleconferences, the Fund did not participate in the hearing.

The issue in dispute as agreed by the parties and as summarized by me has been phrased as follows:

The primary issue is priority, and this turns on an interpretation of a standard owner's policy of insurance and a garage policy of insurance. Do both policies provide for SABS coverage on the facts of this matter? If so, which policy has the higher priority to respond to the claim? This issue may ultimately turn on interpretation of the policies and the legislation and regulations.

The hearing was conducted through an exchange of written material. My long form arbitration agreement was executed in counterpart by Mr. Durant on March 28, 2023 [and again, in conjunction with Mr. Choi, on May 30, 2023], by Mr. Brown on March 15, 2023, and by Mr. Choi on May 30, 2023.

The hearing was conducted through an exchange of written material. I received and reviewed the factum of Economical, the written submissions of Aviva dated June 7, 2023, and the reply of Economical dated June 14, 2023. I commenced my review of the written material shortly thereafter and, on July 4, 2023, I send an e-mail to all counsel which read, in part, "I find myself in something of a quandary. I would like to convene a teleconference at which time I will explain the situation from my perspective". It was agreed that we would speak on July 27, 2023. In advance of that date, I wrote to counsel as follows:

> *I want to give counsel and their clients some insight into why I have asked for a further teleconference with my award pending.*
>
> *I know what I would like to do in relation to my award but I don't think the legal path is clear. Indeed, the legal path may preclude me from doing what I would like to do but what I believe I must do on the facts and evidence and law.*
>
> *I have gone so far as to review the Arbitration Act, 1991, S.O. 1991, c. 17, and specifically section 31 which reads:*
>
> > *[31] An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.*

I see at least two problems with this section. The first is that the parties did not refer to this section or argue this point in the written material. I don't think I am precluded from doing my own research, but I should certainly afford the parties an opportunity to make submissions on this point.

The second problem is that I recall there to be a body of law which says that a priority dispute is purely a creature of statute and the regulations made pursuant to the statute and these legislative provisions must be applied rigorously. Consequently, there is probably an argument to be made that there is no opportunity for me to do what is fair or equitable; rather, I must apply the law to the facts and the evidence even if the result appears to be "unfair or inequitable".

The mid- arbitration teleconference proceeded on July 27, 2023, and I wrote to counsel on July 28, 2023 as follows:

I explained my dilemma in relation to reviewing the written submissions thus far with a view toward writing my award. I encouraged the parties to revisit resolution of this matter, given that it is of relatively modest value. That said, I appreciate that there may be benefit to the insurance industry generally to have a decision on what appears to be a novel point.

Ultimately, I identified three potential paths to go forward.

The first would be to organize a process to allow the parties to deliver supplementary written material in relation to the issue as to whether I have the ability to provide an equitable result in this matter, having regard for the powers afforded to meet as arbitrator but having regard for the statutory nature of a priority dispute.

The second would be to organize a process to allow the parties to provide oral argument which would supplement the written submissions. This could include the issue identified above, after the parties have delivered written material on the issue. By the same token, if the parties agree that there is no room for an equitable result in a statutory regime,

then oral argument would be confined to the issues that have been fully canvassed in the written submissions delivered thus far.

The third would be to provide nothing further to me in which case I will proceed on the written material to work on my award.

The next mid- arbitration teleconference took place on August 31, 2023 and it was agreed as between the respondents that they would make written submissions on the issue as to whether I have the ability to provide an equitable remedy or result in this priority dispute and, if so, whether I should exercise equitable powers on the facts, evidence and law in this particular matter. A timetable was agreed upon in relation to delivery of supplementary written submissions on this aspect of the matter. I received submissions from Economical dated October 26, 2023 and from Aviva on November 9, 2023.

I have reviewed all of the foregoing for purposes of preparing this award.

When I reviewed the initial collection of written submissions on a preliminary basis, I was concerned that a literal application of the insurance policies involved in this dispute, the SABS and the Insurance Act would dictate a finding that Economical was the accident benefit insurer and that there was no basis for Aviva to be the priority insurer or to be involved in a tiebreaker circumstance. I conflated the priority of coverage under section 277 of the *Insurance Act* which relates to liability coverage [which would have Aviva as the higher priority insurer] with the dispute in relation to accident benefit coverage. This led to my quandary and my invitation to counsel to deliver supplementary written submissions in relation to my ability to and the appropriateness of utilizing my powers as an arbitrator in equity to produce a different result. Having now reviewed all of this material in further and greater detail, I am utilizing my powers in equity to determine the issue in dispute but for a different purpose as will be made clear later in this award.

The facts which give rise to this priority dispute are not contentious. I will use acronyms in place of the names of the involved persons to respect their privacy interests. JC was involved in a motor vehicle accident as a pedestrian on October 10, 2019. The vehicle that struck her was owned by CD. The CD vehicle was insured by Economical. At the time of the accident, the CD vehicle was in a garage for repair and under the care and control of a company, RBS. AA was

operating the CD vehicle at the time of the collision with JC. AA was an employee of RBS at all material times. RBS had a valid garage auto policy with Aviva at all material times.

JC applied to the Fund for statutory accident benefits on March 20, 2020. The Fund disputed priority for payment of benefits to JC and put Economical on notice on or about May 7, 2020. Aviva was put on notice by Economical on September 9, 2020 or December 18, 2020. Nothing turns on this discrepancy. The arbitration was commenced on May 13, 2021.

The parties agree that JC does not have any insurance coverage of her own.

ECONOMICAL'S POLICY

Economical issued a standard owner's policy of automobile insurance in favour of CD. Section 268 [1] of the *Insurance Act*, provides in part, "Every contract evidenced by a motor vehicle liability policy … shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule." The SABS defines "insured person" extensively. This definition, found in section 3(1) of the SABS, provides, for purposes of this arbitration, that "insured person" means, "in respect of a particular motor vehicle liability policy, … (b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario". This definition from the Schedule is specifically incorporated into the wording of the owner's policy by reason of section 4.1 of the policy which provides, in part, "for the purposes of Section 4 [accident benefits], insured persons are defined in the Statutory Accident Benefits Schedule."

CD owned an automobile which was specifically listed as the described automobile within the policy issued by Economical. JC was a person who was involved in an accident involving the "insured automobile" and the accident occurred within Ontario. JC is, thus, an "insured person" under the Schedule and falls within the coverage under section 4.1 of the owner's policy.

AVIVA'S POLICY

RBS was the insured under a garage automobile policy (OAP 4) issued by Aviva. There are no issues as between RBS, the insured under the policy and the operator of the garage, and its

employee, AA who was the operator of the vehicle owned by CD and entrusted by her to RBS for repairs. Section 2.1 of the garage policy provides "For purposes of Section 2, insured persons are defined in the Statutory Accident Benefits Schedule and an insured automobile for this purpose includes an owned, a non-owned, and a customer's automobile as defined in this policy". Aviva does not dispute that there is accident benefit coverage available to JC under its policy.

PRIORITY UNDER THE *INSURANCE ACT*

The parties agree that priority disputes are governed by section 268 of the Insurance Act, that there is a priority ladder and that both policies are on the second rung of the priority ladder. For non-occupants such as the claimant JC, the order of priority is established at paragraph 2 of section 268 [2] of the Insurance Act:

> *(2) The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> …
>
> *2. In respect of non-occupants,*
>
> *i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,*
>
> *ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,*
>
> *iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,*
>
> *iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.*

The parties agree that JC was not insured under her own policy. As a non-occupant, her claim falls to the second rung and is governed by subparagraph (ii). JC has recourse to the insurer of the vehicle which struck her, being the CD vehicle. Both the Economical and Aviva policies provide accident benefit coverage to the CD vehicle at the time of the accident. Both policies are on the second rung of the priority ladder.

If I understand the submissions and arguments made on behalf of Economical, Aviva was the insurer of the CD vehicle when it struck the claimant, JC. This is 100% correct if the parties were looking for a determination as to which third party liability insurer would have the higher priority coverage to respond to a bodily injury claim brought by the claimant, JC, as against the driver and the owner of the striking vehicle. This is not the nature of the dispute before me. Aviva concedes that there is accident benefit coverage available to the claimant under its garage auto policy. I found, above, that there is accident benefit coverage available to the claimant under Economical's owner's policy.

There are certain circumstances where two or more insurers have the same priority i.e. appear on the same rung of the priority ladder to respond to a claim for statutory accident benefits. Section 268 [4] deals with this circumstance explicitly and provides as follows:

> *(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.*

On a careful review of this section, a claimant has a choice to make under subparagraphs i or iii of paragraph 2 but has no choice to make if the claimant qualifies for statutory accident benefits under subparagraph ii of paragraph 2. The latter is precisely the situation between the parties and before me.

The omission of the second priority rung from the tiebreaker provision has previously been considered by Arbitrator Novick in *Aviva Insurance Company of Canada v. Protective Insurance Company*, 2019 CarswellOnt 13845 [August 22, 2019]. In this case, the claimant was a bicyclist struck by a van. The van was owned by New Horizons and insured with Aviva under a fleet policy. The vehicle was leased by New Horizons to FedEx and while the van used by FedEx, the van was also insured under a fleet policy issued by Protective Insurance Company to FedEx. The parties in that case agreed that both policies provided coverage to the bicyclist because both policies insured the vehicle that struck the claimant. This placed both policies on the second priority rung. Arbitrator Novick concluded that the omission of the second priority rung from the tiebreaker provision found in section 268 [4] was intentional on the part of the

Legislature with the result being that the first insurer to receive the completed application for benefits from the applicant had priority for the claim.

Aviva submits that the same rationale is equally applicable to the present case. The potential for overlapping coverage for a vehicle under repair is just as foreseeable as the potential for overlapping coverage for a leased vehicle. Statutes are presumed to have been drafted competently with purpose. The priority scheme within the Insurance Act and its regulations is a complete code. The omission of the second rung from the tiebreaker provision must therefore be viewed as a conscious choice by the drafters. I agree.

Aviva submits that the decision to omit the second rung from the tiebreaker provision does not result in a tie. Section 2.1 (6) of Regulation 283/95, entitled Disputes Between Insurers, provides as follows:

> *The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the schedule pending the resolution of any dispute as to which insurer is required to pay the benefits.*

In the matter before me, the completed application for benefits was received by the Fund. While it is true that the Fund put Economical on notice in relation to the priority dispute at a point in time and Economical put Aviva on notice in relation to the priority dispute at a later point in time, neither of the insurers received a "completed application for benefits from the applicant". There is considerable case law as to what constitutes a completed application for benefits. I am unaware of any law which would treat notice from the Fund to an insurer of a priority dispute as the legal equivalent of receiving the applicant's completed application for benefits. Similarly, I am unaware of any law which would authorize the Fund, explicitly or implicitly, to choose the higher priority insurer by virtue of the timing of notice of a priority dispute to one or more insurers.

If I am in error and if notice of the priority dispute from the Fund to Economical is the legal equivalent of receipt of a completed application for benefits from the applicant, then I would find that Economical is the higher priority insurer. By reason of receiving the legal equivalent of a completed application for benefits and by reason of the tiebreaker provision in section 268 being

unavailable under the second rung of subparagraph 2, the claimant has no choice and Economical cannot establish that the Aviva policy is higher priority to the Economical policy.

By way of observation, if the claimant had submitted a completed application for benefits directly to either Economical or to Aviva in relation to the garage auto policy, I would find Economical or Aviva, as the case may be, to be the higher priority insurer by reason of receiving a completed application for benefits and by reason of the tiebreaker provision in section 268 [4] being unavailable under the second rung of paragraph 2. The foregoing demonstrates what can be the apparent arbitrary nature of a priority dispute where certainty and predictability are preferred over fairness and equity.

The parties are in agreement that the *Arbitration Act*, 1991, SO 1991, c. 17, does provide an arbitrator with an ability to provide an equitable remedy. The Act provides, part:

> *Application of law and equity*
>
> > *31 An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.*
>
> *Conflict of laws*
>
> > *32 (1) In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances.*

Both parties referred me to the decision of the Court of Appeal for Ontario decision in *Kingsway General Insurance Company v. West Wawanosh Insurance Company*, [2002] CanLII 14202 (ON CA) which considered the application of the 90-day notice provisions and the ability or inability of an arbitrator to grant relief from forfeiture or otherwise exercise equitable discretion to extend the time for 90-day notice of a priority dispute. The arbitrator at first instance found that the 90-day period for notice had expired. On appeal, the Superior Court of Justice refused to grant relief from forfeiture or otherwise exercise discretion to extend the 90-day notice period. The Court of Appeal said the following:

> *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.*

Economical submits that it has been decided that where the regulation is clear and specific, there is little room for interpretation and creativity for the arbitrator to decide cases. It was not decided that there was no room for interpretation and creativity. To the contrary, there is little room only "where the regulation is clear and specific".

Aviva submits that the admonition from the Court of Appeal applies to priority disputes in their entirety and not simply to cases arising from the notice provisions. Aviva offers as support a comment made by Arbitrator Novick in *Belair Direct Insurance Company of Canada v. Security National Insurance Company*, 2014 CarswellOnt 19208 which provides as follows:

> *While these comments [of Sharp J.A in Kingsway General v. West Wawanosh] arose in the context of a dispute about whether the savings provision in subsection 3(2) should apply, the general message from the Court of Appeal is clear – the rules are to not be made to deal with the equities of a particular case. I take this to mean that while an arbitrator may consider an argument based on equitable principles, interpretations of the regulation that are either "creative" or based purely on equitable considerations must be avoided.*

Equitable jurisdiction of an arbitrator has been exercised to consider whether an insurer should be allowed to resile from an agreement to accept priority or whether the principles of restitution or unjust enrichment are available to allow for the recovery of adjusting costs. Equitable

jurisdiction has not and should not be used to disrupt the allocation of priority within the priority ladder. In *Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance v. Gore Mutual Insurance*, 2022 ONSC 3188, Justice F.L. Myers of the Ontario Superior Court of Justice, hearing an appeal from Arbitrator Bialkowski, said the following:

> *Fairness among the sophisticated insurers is provided by certainty and clarity. The steps in the ladder are not to be interpreted with imaginative approaches to strain to do some form of equity among insurers in particular cases. Rather, the words should be given their plain meaning to promote predictability. This allows insurers to readily understand and model their obligations so as to plan for the businesses accordingly.*

By reason of the unique circumstances of this claim, where I have found that the completed application for benefits from the applicant was received by the Fund, and where I have found that both the Economical and Aviva policies of automobile insurance afford accident benefit coverage to the claimant JC, section 268 [4] of the Insurance Act does not authorize the Fund to choose which insurer, as between Economical and Aviva, should have the higher priority to assume carriage and responsibility for the underlying accident benefit claim. Rather, this is the right of the accident benefit claimant ["person"] in his or her absolute discretion to decide the insurer from which he or she will receive benefits.

I will exercise my equitable jurisdiction with the following result. If the underlying accident benefit claim remains open, then the claimant has, in her absolute discretion, the right to decide the insurer from which she will claim benefits as between Economical and Aviva.

If the underlying accident benefit claim has been resolved on a full and final basis, which was certainly contemplated and imminent at the time of the last mid-arbitration teleconference, it makes no sense to me to confer the power of choice and determination of this priority dispute to a person who has no interest in the outcome. Under this further unique circumstance, I will exercise my equitable powers and order that the amounts to which the Fund is entitled by reason of this priority dispute shall be divided equally as between Economical and Aviva.

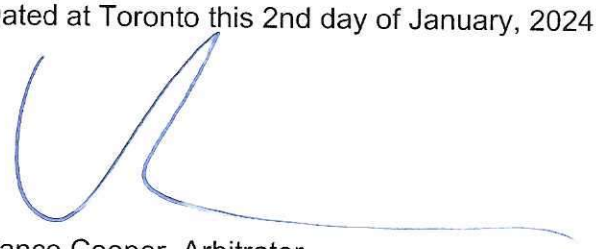
I remain seized of this matter to determine the quantum of reimbursement to which the Fund is entitled. I remain seized of this matter to determine the costs to which the Fund is entitled and costs as between the respondent insurers, Economical and Aviva.

Pursuant to the arbitration agreement, the parties have an automatic right of appeal on a point of law or a point of mixed fact and law to a judge of the Ontario Superior Court of Justice within 30 days of the release of my award. Until the time for appeal has expired, I am not to determine the burden of costs, their scale or quantum. That said, the agreement provides that my fees, expenses and disbursements as arbitrator will generally be borne by the unsuccessful insurer. In the event of an appeal, my award is deemed to be stayed, pending the outcome of any such appeal with the exception of payment of my account for fees, expenses and disbursements which will be borne equally by the parties, pending the final determination of all appeals.

Consequently, I will proceed to render an account divided equally between the respondent insurers, to be adjusted depending upon the result of any appeal, if undertaken, an agreement between the parties or further order or disposition I may make as an incident of adjudicating costs as between the parties.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion. I wish to thank counsel for their thoughtful, comprehensive and creative submissions. I am particularly thankful and appreciative of the effort of counsel to make further written submissions on the issue of equitable relief by reason of the quandary which I raised with counsel after my first read of the initial collection of submissions. As it turns out, the supplementary submissions on equitable relief were very important but for a different reason than that originally contemplated by me.

Dated at Toronto this 2nd day of January, 2024.



Vance Cooper, Arbitrator