CITATION: Kingsway General Insurance Company v. Ontario, 2007 ONCA 62
DATE: 20070131
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COURT OF APPEAL FOR ONTARIO

LASKIN, SIMMONS, GILLESE and MacFARLAND JJ.A. and LANE J. (*ad hoc*)

IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.8, as amended, and Regulation 283/95 made pursuant to the *Insurance Act*;

AND IN THE MATTER of the *Motor Vehicle Accident Claims Act,* R.S.O. 1990, c.M.41;

AND IN THE MATTER of the *Arbitration Act, 1991*, S.O. 1991, c.17;

AND IN THE MATTER of an arbitration.

B E T W E E N :	)	
	)	
KINGSWAY GENERAL INSURANCE COMPANY	)	**Jamie R. Pollack and Edmund K. Chan, for the respondent**
	)	
Applicant (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE	)	**Harold W. Sterling and John Friendly, for the appellant**
	)	
Respondent (Appellant in Appeal)	)	
	)	
	)	**Heard: June 13, 2006**

On appeal from the order of Justice Michael R. Dambrot of the Superior Court of Justice, dated January 27, 2005, reported at [2005] O.J. No. 266 (Q.L.).

LASKIN J.A.:

A. Overview

[1] This appeal was argued together with the appeal in *Allstate Insurance Company of Canada v. Motor Vehicle Accident Claims Fund and Manitoba Public Insurance*. Both appeals raised the same question of interpretation: is the Motor Vehicle Accident Claims Fund an insurer under O. Reg. 283/95, the regulation that provides for the mandatory arbitration of disputes between insurers over the payment of accident benefits to persons injured in car accidents?

[2] This appeal arises out of a dispute between the Fund and Kingsway General Insurance Company over the payment of accident benefits. Two days before the accident, Kingsway had cancelled its policy of insurance because of insufficient funds in the insured's bank account to pay the monthly premium. When Kingsway later refused to pay accident benefits to the injured person, the Fund paid them and sought reimbursement at an arbitration.

[3] The arbitrator, Mr. Robinson, conducted the arbitration under regulation 283. He concluded that at the time of the accident, a "significant nexus" existed between the insured and Kingsway. Because of this nexus, under section 2 of the regulation, Kingsway was required to pay accident benefits and then dispute its obligation to do so. The arbitrator ordered that Kingsway pay the injured person's accident benefits permanently because of its breach of section 2.

[4] On appeal, Dambrot J. held that the arbitration was not conducted under regulation 283 because the Fund was not an insurer. He held, however, that it was an arbitration by agreement under the *Arbitration Act, 1991*, S.O. 1991, c.17. Although he accepted that Kingsway ought to have paid accident benefits pending the arbitration, he held that the arbitration agreement did not authorize ordering Kingsway to pay benefits permanently for a breach of section 2 of the regulation. He remitted the dispute to the arbitrator to determine whether Kingsway was an insurer.

[5] In this court, the Fund asks that the order of the appeal court judge be set aside and that the award of the arbitrator be restored.[1] In support of its position, the Fund makes three submissions. First, the Fund submits that the appeal court judge erred in concluding

[1] Before the arbitration, the parties agreed under s. 45 of the *Arbitration Act, 1991* that either could appeal the arbitrator's award on a question of mixed fact and law. This court granted leave to appeal the order of Dambrot J. under s. 49 of the *Arbitration Act, 1991*.

that the arbitration was not conducted under regulation 283. Second, it submits that the appeal court judge erred in holding that the arbitrator had not found Kingsway to be an insurer at the time of the accident. Third, in the alternative, the Fund submits that even if Kingsway was not an insurer, the arbitrator correctly ordered Kingsway to pay accident benefits for its breach of section 2 of regulation 283. Thus, the appeal court judge erred in remitting to the arbitrator the question whether Kingsway was an insurer.

[6] On the Fund's first submission, for the reasons in *Allstate v. Motor Vehicle Accident Claims Fund*, I would hold that the Fund is an insurer under regulation 283. Therefore, this arbitration was conducted under that regulation. On the Fund's second submission, in my view, the appeal court judge was correct in holding that the arbitrator did not decide that Kingsway was an insurer. On the Fund's third submission, in my opinion, the appeal court judge was correct in remitting to the arbitrator the question whether Kingsway was an insurer.

B. Facts Giving Rise to the Dispute

[7] On April 1, 2000, while walking along the street, Irene Legarde was injured when she was hit by a car owned and driven by her cousin Frances Legarde. Kingsway had been Frances Legarde's insurer. Kingsway would therefore have been liable to pay Irene Legarde's accident benefits except that on March 30, 2000 – two days before the accident – Kingsway had cancelled Frances Legard's insurance.

[8] Why had it done so? Because the monthly premium payment of $123.58 deducted from Frances Legarde's bank account had been returned NSF. At the time, Frances Legarde had a balance in her account of $116.20, leaving a shortfall of $7.38.

[9] In August 2000, Irene Legarde applied to Kingsway for accident benefits. Kingsway refused to pay, claiming that Frances Legarde was not insured on the date of the accident. Irene Legarde eventually applied to the Fund, which paid the benefits and began arbitration proceedings to recover the amount it had paid from Kingsway.

C. Analysis

1. Did the appeal court judge err in concluding that the arbitration was not conducted under O. Reg. 283/95?

[10] The arbitrator noted the special status of the Fund. Relying on the decision of Kennedy J. in *Ontario (Minister of Finance) v. ING Halifax* (2003), 15 C.C.L.I. (4th) 281 (Ont. Sup. Ct.), he held that although the Fund was not an insurer, its special status allowed it to use the dispute resolution process under regulation 283.

[11] The appeal court judge pointed out that regulation 283 applied only to disputes between insurers. He then applied this court's decision in *Kalinkine v. Ontario (Superintendent of Financial Services)*, [2004] O.J. No. 5138 and held that because the Fund was not an insurer the arbitration was not conducted under the regulation. He held, however, that the parties had entered into an arbitration agreement, which was governed by the provisions of the *Arbitration Act, 1991*.

[12] For the reasons in the companion appeal, *Allstate v. The Fund*, I would hold that the Fund is an insurer under regulation 283. Therefore, the Fund properly instituted arbitration proceedings under section 7 of regulation 283.

2. Did the appeal court judge err in holding that the arbitrator had not found Kingsway to be an insurer at the time of the accident?

[13] The Fund argues that the arbitrator found Kingsway to have been Frances Legarde's insurer at the time of the accident. The appeal court judge did not read the arbitrator's award that way and I do not either. Nowhere in his reasons does the arbitrator expressly find that Kingsway was an insurer.

[14] However, as I said earlier, the arbitrator did find a "significant nexus" between Frances Legarde and Kingsway. He based that finding on two considerations. First, Kingsway had included retail sales tax on the premium that it charged Frances Legarde; she, however, was a Status Indian living on a band reserve and therefore was exempt from retail sales tax. Second, Kingsway had rated Frances Legarde as a Class 02 risk, a rating reserved for those who drive to work; she, however, was on welfare and should have been rated as a Class 01 risk, which would have attracted a lower premium. If Frances Legarde had not been charged retail sales tax and had been properly rated, her monthly premium would have been $111.87, and the amount in her account ($116.20) would have been sufficient to pay it. Thus, Kingsway would have had no reason to cancel her policy.

[15] I agree with the arbitrator's finding of a nexus between Frances Legarde and Kingsway. The two considerations underlying his finding are supported by the record. What flows from this nexus leads to the third issue on appeal.

3. Did the appeal court judge err in remitting to the arbitrator the question whether Kingsway was an insurer?

[16] Irene Legarde first applied to Kingsway for accident benefits. The arbitrator concluded that Kingsway should have paid her benefits because of the nexus between it

and Frances Legarde at the time of the accident. The arbitrator held that Kingsway's failure to pay benefits was a breach of section 2 of regulation 283, which provides:

> The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.

He penalized Kingsway for its breach by ordering it to pay Irene Legarde's accident benefits permanently.

[17] The appeal court judge agreed that Kingsway had breached section 2. But he held that the arbitrator had no jurisdiction to impose a penalty. In his view, the arbitrator's only task was to determine whether Kingsway or the Fund was responsible to pay benefits to Irene Legarde. In order to find Kingsway responsible, it had to be an insurer at the time of the accident. The arbitrator was required to decide that question. The appeal court judge therefore set aside the award and remitted the question to the arbitrator.

[18] In this court, the Fund contends that the arbitrator correctly sanctioned Kingsway for its breach of section 2. Kingsway contends that the arbitrator had no authority to order it to pay accident benefits for a breach of section 2, and that the appeal court judge was correct in setting aside the award.

[19] 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 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, or as in this case, by an insurer's claim that no policy of insurance existed at the time.

[20] Insurers cannot avoid their obligation under section 2 by claiming that another insurer should pay or that an insurance policy was cancelled shortly before the accident. If they could deny an application for accident benefits on either of these grounds, section 2 would be rendered meaningless. Thus, arbitrators and the courts have developed a nexus test for triggering an insurer's obligation under section 2. As long as there is some nexus – some connection – between the insurer receiving an application for benefits and the insured, the insurer must pay pending the determination of its obligation to do so. In addition to the arbitrator's ruling in this case, see for example *Allstate Insurance*

Company of Canada v. Brown (1998), 40 O.R. (3d) 610 (Div. Ct.); and *Ontario (Minister of Finance) v. Royal & Sun Alliance* (January 2003, Arbitrator M. Guy Jones).

[21] The nature of the nexus or connection required to trigger the insurer's obligation under section 2 will vary from case to case. Although I am inclined to agree with Arbitrator Jones in *Royal & Sun Alliance, supra* – "[o]nly in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay" – to address the case before us I need not be precise about the extent of the connection required. Here, the arbitrator found a significant connection, and there can be no doubt that this connection was sufficient to require Kingsway to pay Irene Legarde's accident benefits. Indeed, Kingsway's hardball tactics in refusing to pay undermine the very purpose of section 2. The appeal court judge put it this way:

> [22] In my view it makes perfect sense to require Kingsway to pay the benefits in the first instance in circumstances such as these despite the fact that is says that it is not an insurer. If an insurance company is permitted to refuse to pay benefits simply because it decides that it is not an insurer despite the existence of some connection between the company and the driver, it would undermine the purpose of the regulation – that accident victims not be denied statutory accident benefits simply because the first insurer applied to for benefits thinks another insurer should pay.

I agree with these comments. I add that Kingsway's refusal to pay was particularly egregious because, by doing so, it transferred the initial financial burden to the publicly financed Fund.

[22] What remedy should be imposed for Kingsway's breach? It is tempting to agree with the remedy the arbitrator imposed: require Kingsway to pay Irene Legarde's accident benefits regardless of whether it was an insurer at the time of the accident. The arbitrator no doubt considered – with justification – that insurers would not take their obligation under section 2 seriously unless some penalty was imposed for its breach.

[23] As tempting as it is to restore the arbitrator's award, I think that the appeal court judge was correct in requiring the arbitrator to determine whether Kingsway was an insurer at the time of the accident. The arbitrator might well have made that finding as he seemed to conclude that Kingsway's own errors led it to cancel Frances Legarde's insurance policy. On reflection, the arbitrator may determine that Kingsway had no valid grounds to cancel the policy and therefore the policy was in effect at the time of the accident. If so, it will be unnecessary to consider whether a sanction can and should be imposed for Kingsway's breach of section 2.

[24] If the arbitrator finds Kingsway was not an insurer, then he can consider the question of the appropriate order in the light of that finding. His consideration should then include not only the effect of Kingsway's breach of section 2 of regulation 283, but as well the effect of Kingsway's failure to give timely notice of its intent to dispute its obligation to pay in accordance with section 3 of the regulation.

[25] I would therefore uphold the appeal court judge's order remitting to the arbitrator the question whether Kingsway was an insurer when the accident occured.

D. Conclusion

[26] For the reasons in *Allstate v. Motor Vehicle Claims Accident Fund*, I would hold that the Fund is an insurer under regulation 283. Therefore, the arbitration initiated by the Fund between it and Kingsway was conducted under that regulation. The appeal court judge, however, was correct in concluding that the arbitrator did not determine the question whether Kingsway was an insurer when the accident occurred and in remitting that question to the arbitrator.

[27] Therefore, I would allow the appeal by holding that the arbitration was conducted under regulation 283. In all other respects I would dismiss the appeal. As success in the appeal was divided, I would make no order for costs.

RELEASED: JAN 31 2007
JIL

"John Laskin J.A."
"I agree Janet Simmons J.A."
"I agree E.E. Gillese J.A."
"I agree J. MacFarland J.A."
"I agree D. Lane J. (*ad hoc*)"