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:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

and

AVIVA INSURANCE COMPANY and STATE FARM INSURANCE COMPANY/CERTAS HOME & AUTO INSURANCE COMPANY

Respondents

PRELIMINARY ISSUE DECISION

Heard: May 2, 2019

Counsel:

Sharon C. Dagan for the Applicant

Derek R. J. Greenside for the Respondent Aviva Insurance Company

Mark K. Donaldson for the Respondent State Farm Insurance Company/Certas Home & Auto Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Overview and Issue:

This decision is in respect of a preliminary issue arising from a Statutory Accident Benefits ("SABS") priority dispute. The priority dispute arises out of an accident occurring May 29, 2016. Sarah Rix ("the claimant") was struck while a pedestrian by a vehicle insured by the Respondent, State Farm Insurance Company/Certas Home & Auto Insurance Company ("Certas").

The preliminary issue to be decided is whether the Applicant ("Dominion") has complied with the requirements of Regulation 283/95 of the *Insurance Act* in respect of its commencement of arbitration against the Respondents. Specifically, the question is whether Dominion commenced arbitration no later than one year after the day Dominion first gave notice under section 3 of Regulation 283/95, as required by subsection 7 (3) of Regulation 283/95.

For the purposes of the determination of the preliminary issue the following facts are assumed to be correct:

The claimant submitted a SABS application to Dominion. Dominion insured the common law spouse of the applicant's father. To be entitled to SABS from Dominion the claimant would have to be principally dependent for financial support or care upon her father's common law spouse. Dominion takes the position that the claimant is not principally dependent as indicated on her father's common law spouse.

As required by Regulation 283/95 of the *Insurance Act*, as the first insurer to receive a completed SABS application Dominion commenced handling the claimant's

SABS claim. It then sought to determine whether there were other insurers with higher priority under section 268 (2) of the *Insurance Act.*

Dominion learned that the Respondent Aviva Insurance Company ("Aviva") insured the claimant's father at the time of the accident. Dominion served a Notice of Dispute between Insurers ("NDBI") on Aviva by facsimile transmission on June 29, 2016. The claimant was also served with this NDBI care of her legal representative. To be entitled to SABS from Aviva the claimant would have to be principally dependent for financial support or care upon her father.

Aviva acknowledged receipt of Dominion's NDBI by way of correspondence July 12, 2016 from an Aviva claims adjuster. Aviva's correspondence to Dominion indicates that Aviva had opened a file with respect to the matter and assigned it a claim number. Aviva's correspondence requested information to assist it in determining whether it had priority for the claim.

On August 29, 2016 Dominion served an NDBI on Certas, the insurer of the vehicle which struck the claimant. Certas would have the lowest SABS priority. It would only be ultimately responsible to pay SABS if the claimant was not principally dependent upon either of Dominion's or Aviva's insured. This NDBI was also served upon the claimant's legal representative.

The claimant registered her objection to the transfer of the handling of her SABS claim to either Aviva or Certas on July 11, 2016 (Aviva) and September 6, 2016 (Certas).

On September 29, 2016 Certas wrote to Dominion acknowledging receipt of Dominion's NDBI, advising that it would not accept priority at that time, and requesting additional information.

On November 1, 2016 Dominion wrote to Certas providing some information in response to the requests made in Certas' September 29, 2016 letter.

On February 6, 2017 Dominion sent a letter to Certas. For the purposes of the preliminary issue, the important part of the letter reads as follows:

> At this time, please accept this letter as our formal demand for arbitration. We hope that it will not be necessary to incur unnecessary legal fees. Therefore, please advise us in writing if you will be accepting priority or assign council (*sic)* to appoint an arbitrator.

Certas responded with a February 23, 2017 letter acknowledging receipt of Dominion's February 6, 2017 letter. Again Certas declined to accept priority and requested information.

Counsel then became involved on behalf of Dominion and Certas. Correspondence was exchanged between them.

On June 29, 2017 Dominion's counsel sent a letter to Aviva. The letter was sent via regular mail and was received by Aviva on July 7, 2017. This was the first communication by Dominion to Aviva since Dominion served its NDBI on Aviva by fax on June 29, 2016. Apart from Aviva's responding letter of July 12, 2016 described above, there is no evidence of any communication between Dominion and Aviva between June 29, 2016 and Dominion's June 29, 2017 letter.

Dominion's June 29, 2017 letter to Aviva indicated that counsel was following up on the NDBI sent to Aviva on June 29, 2016, and enclosed a Notice of Commencement of Arbitration ("NCA"). In the NCA both Aviva and Certas were named as respondents to the arbitration.

On July 5, 2017 Dominion's counsel sent a letter to Certas via fax which enclosed a NCA naming both Aviva and State Farm as respondents to the arbitration.

On November 9, 2017 I received a letter from Dominion's counsel requesting that I accept an appointment as Arbitrator for the priority dispute. This letter was addressed to me and copied to counsel for Certas who had previously been retained, as well as to Aviva referencing the Aviva policy number and the name of Aviva's insured.

Aviva did not immediately appoint counsel and a follow-up letter was sent February 27, 2018 to a specific adjuster at Aviva referencing details of the priority dispute matter and that arbitration had been commenced with me as the Arbitrator. Dominion's counsel was seeking to have Aviva appoint counsel so that the arbitration could proceed with Aviva's involvement.

In April, 2018 the parties and I were advised of the retainer of Mr. Greenside as counsel for Aviva. It was at that point that proceedings in the arbitration got underway with the scheduling of a prehearing conference.

I will note here that apart from my appointment as Arbitrator (which was ultimately agreed to by all parties in any event) all parties as represented by counsel have been able to fully participate in every step of the arbitration proceedings.

I mention this because to the extent that the question of prejudice to any party may be a relevant consideration for the preliminary issue, on the facts before me there is no evidence of prejudice accruing to any party insofar as the parties' ability to adequately deal with the issues raised in the priority dispute is concerned.

I want to stress here however, that my decision on the preliminary issue is not based on a finding that no prejudice has accrued to any party. It is based entirely upon my conclusions with respect to what Regulation 283/95 requires with respect to commencing a timely arbitration.

The Positions of the Parties

The arguments advanced by Aviva and Certas on the preliminary issue are different so I will address them separately.

Aviva's position is that Dominion failed to commence arbitration in accordance with the requirements of subsection 7 (3) of Regulation 283/95 because it served Aviva with a NCA more than one year after it served Aviva with a NDBI. Aviva did not receive Dominion's NCA sent by ordinary mail until several days after the one year limitation period set out in subsection 7 (3) had expired. On the facts, there is no doubt that Aviva could not be deemed served with the NCA accompanying Dominion's June 29, 2017 letter until after the limitation period had expired.

Aviva argues that even if Dominion's February 6, 2017 letter was sufficient to commence arbitration (against which position Certas argues more strenuously, but Aviva does not concede it) it was insufficient to commence arbitration against Aviva because it was directed only to Certas and the claimant.

In essence, Aviva's position would require that to properly commence arbitration an insurer must serve a NCA naming every insurer whom it has served with a NDBI against whom it wishes to pursue arbitration no later than one year after the day that the insurer paying benefits serves the first NDBI.

Certas' position focuses on the adequacy of Dominion's steps to commence arbitration and specifically on the issue of whether Dominion's February 6, 2017 letter directed to Certas and the claimant was sufficient to commence arbitration. Certas's criticisms of Dominion's February 6, 2017 letter include that it made no reference to an Arbitration Agreement, did not include a NCA, and did not make reference to "enabling legislation".

Certas also argues that since the claimant registered an objection to the transfer of the handling of her SABS claim, she is entitled under subsection 5 (1) of Regulation 283/95 to participate in any proceeding to settle the dispute. Certas states in its argument, "*There is no indication in the materials provided by Dominion that the arbitration has been initiated as against the claimant*."

Dominion's position is that it is February 6, 2017 letter satisfies the requirements of the *Arbitration Act* and Regulation 283/95 to have validly commenced arbitration in timely fashion.

Dominion argues that since there can be only one arbitration to determine a priority dispute it is sufficient if even one insurer who has been served with a NDBI is served with a demand for arbitration. If there are other insurers involved in the dispute

they will simply be included as parties to the arbitration – there is no need to serve each of them with a demand for arbitration.

Dominion analogizes what occurred in this case to the situation where the first tier insurer serves a NDBI on a second tier insurer and commences arbitration against only the second tier insurer. The second tier insurer may involve third tier insurers in the resolution of the priority dispute simply by serving them with a NDBI (*cf.* Section 10, Regulation 283/95). There is no requirement for either the first tier insurer or the second tier insurer to formally commence arbitration against the third tier insurers. Those insurers will become parties to the arbitration commenced by the first tier insurer and the priority dispute involving all of the insurers will be resolved in the one arbitration.

Analysis

On the facts which have been assumed to be true for the purposes of this preliminary issue, in my opinion the only way Dominion can have validly commenced arbitration in this situation is if its February 6, 2017 letter is sufficient both in form and in substance to do so.

Dominion's letters and accompanying NCAs of June 29, 2017 and July 5, 2017 addressed to Aviva and Certas respectively were served more than one year after Dominion – the insurer paying benefits, served its first NDBI on Aviva June 29, 2016. Therefore neither of these letters and enclosures could validly commence arbitration.

I will first address the question of whether the form of Dominion's February 6, 2017 letter is adequate to commence arbitration.

Section 23 (1) of the *Arbitration Act* 1991 states:

An arbitration may be commenced in any way recognized by law, including the following:

> 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.
>
> 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party served a notice to exercise that power on the person and serves a copy of the notice on the other parties.
>
> 3. A party serves on the other parties a notice demanding arbitration under the agreement.

It has been held that Regulation 283/95 functions as if it were an agreement amongst insurers to arbitrate for the purposes of interpreting section 23 of the *Arbitration Act* (*Gore Mutual Insurance Co. v. Markel Insurance Co.* [1999] O.J. No. 2688). Section 7 of Regulation 283/95 clearly requires priority disputes to be resolved through arbitration under the *Arbitration Act*.

In my opinion the form of Dominion's February 6, 2017 letter is sufficient to commence arbitration. The words in the letter, *"…please accept this letter as our formal demand for arbitration"* are virtually identical to the content of the letter under consideration in *The Cooperators v. Perth Insurance, Aviva Canada, Intact Insurance Company and TD Insurance Company* (February 3, 2015). In that case Arbitrator Ken Bialkowski held that the letter containing these words was sufficient to commence arbitration. I agree with his analysis and conclusion.

He stated, *"what could be clearer than 'a formal demand for arbitration'? These are the very words used in the Arbitration Act as an example of how an arbitration can be commenced."*

Arbitrator Bialkowski referred with approval to the decision of Arbitrator Lee Samis in *Markel insurance Company v. Cooperators General Insurance Company and Lombard Canada Ltd.* (March 31, 2011) where arbitrator Samis stated that the proper commencement of arbitration must involve an action taken which signals a clear intention to start a process that will end with a determination of rights by an arbitrator. There should be no uncertainty in the mind of the recipient about whether the process is being invoked.

I do not find merit in Certas' argument that the February 6, 2017 letter is deficient because it does not refer to an arbitration agreement or enabling legislation. The case law and the statutory provisions themselves make it clear that neither of these things is necessary to validly commence a priority dispute arbitration.

Although it was not strenuously argued, to the extent there was any assertion that the February 6, 2017 letter created uncertainty or was vague with respect to Dominion's intentions, I would not agree. The operative wording of the letter is short, to the point, and clear. Arbitration is being demanded. There are some polite words in the next sentence about Dominion being hopeful that an adversarial proceeding would not be necessary but those words are followed with a clear statement that if Certas was not going to accept priority than it should assign counsel to appoint an arbitrator. In my view this leaves no doubt that Dominion sought arbitration if Certas would not accept priority.

This brings me to consider whether the February 6, 2017 letter is in substance sufficient to commence arbitration involving both Certas and Aviva. On this point Certas and Aviva have argued that the letter is defective for the purposes of commencing arbitration because – Aviva submits, the letter was not directed to Aviva, and – Certas submits, there is no indication that arbitration has been initiated as against the claimant.

I will address the argument advanced by Certas first. Although Regulation 283/95 subsection 5 (3) permits a claimant who has given a notice of objection to the transfer of the handling of their claim to participate as a party in "any subsequent proceeding" which would include an arbitration, I do not find anything in the Regulation which requires an insurer to commence arbitration against a claimant to resolve a priority dispute it has with another insurer.

To the extent that the claimant should be notified that arbitration has been commenced so they may participate as indicated, that occurred in this case because the February 6, 2017 letter making a formal demand for arbitration was copied to counsel for the claimant.

It should also be remembered that the claimant's involvement in the arbitration of the priority dispute is for the limited purpose of addressing the issue of which insurer should handle their claim for SABS. The claimant's wishes in this respect have no bearing on the determination of which insurer has the ultimate responsibility for the payment of SABS under 268 (2) of the *Insurance Act*.

With respect to Aviva's position that the February 6, 2017 Dominion letter addressed to Certas and copied to the claimant was insufficient to commence arbitration – at least against Aviva, I am unable to agree.

One purpose for Regulation 283/95 is to provide insurers with a system to resolve their disputes as to which insurer has ultimate responsibility to pay SABS to claimants. Many cases over the years have commented that the system was intended to operate in a predictable, efficient way, in every case. Carving out judicial exceptions for the equities of a particular case is to be discouraged (*Kingsway General Insurance Company v. West Wawanosh Insurance Company* [2002] O.J. 2002 ONCA per Sharpe J.A.)

The Court of Appeal has also very recently emphasized that the priority dispute system is intended to operate in a summary fashion with the objective being to enable insurers to resolve their disputes with straightforward application of the provisions of Regulation 283/95. Complicated legal analysis and protracted proceedings are to be avoided whenever possible (*Her Majesty the Queen as Represented by the Minister of Finance ("The Motor Vehicle Accident Claims Fund") v. Echelon General Insurance Company*, 2019 ONCA 629, per Lauwers J.A.).

I approach my analysis having in mind these directives from the court.

What does Regulation 283/95 say about how a priority dispute is to be commenced? The first and critical step is the issuance of a NDBI by an insurer who is paying benefits to a claimant and who wishes to challenge ultimate responsibility for the payment of those benefits with another insurer or insurers. There are time constraints

respecting the issuance of such a NDBI. There is no dispute in this case that the NDBIs served by Dominion first on Aviva and then on Certas were valid.

Once the first NDBI has been served, the clock begins to run on the limitation period to commence arbitration to resolve the priority dispute. Arbitration must be commenced no later than one year after the day the insurer paying benefits served its first NDBI. In this case this was the NDBI Dominion served on Aviva June 29, 2016.

In interpreting the provisions of Regulation 283/96 regarding the commencement of the priority dispute process the courts have recognized that it would be unreasonable to impose too stringent a standard upon insurers involved in the process since it is simply not practical to do so given everything the insurers have to deal with at the beginning of a claim. In particular, the first insurer to receive a SABS application must first and foremost begin adjusting the claimant's SABS claim. That can be complex enough, but when the 90 day time limit for the issuance of a NDBI is added to this responsibility the tasks can become overwhelming.

In Cooperators General Insurance Company v. Her Majesty the Queen in Right of Ontario As Represented by the Minister of Finance (aka Motor Vehicle Accident Claims Fund) (2014 ONSC 515), the Ontario Superior Court upheld Arbitrator Shari Novick by finding that the priority dispute process was validly commenced if an insurer served a timely NDBI on at least one other insurer. It did not matter whether the NDBI serving insurer knew or ought to have known about the existence of other potentially prior insurers but did not include them in the NDBI. The court held that the wording of subsection 3 (1) of Regulation 283/95 essentially gives the NDBI serving insurer

discretion to serve any one insurer who it claims is in higher priority. It is not necessary that all such insurers be served.

Regulation 283/95 is designed to allow for the fact that every insurer who potentially could have involvement in a priority dispute may not be included in the initial NDBI served by the first tier insurer paying benefits. Section 10 of the Regulation provides a mechanism for these other insurers to be brought into the priority dispute. A second tier insurer (i.e. the insurer which was served with the first NDBI) may serve its own NDBI on another insurer or insurers it claims has higher priority to it. It is not necessary for insurers who are served with an NDBI to serve another insurer who has previously been served – they are already included in the process. Arbitral and court decisions have also held that these subsequent insurers are not constrained by the 90 time limit imposed upon the insurer paying benefits for the service of a NDBI.

In theory this cascading of service of NDBI's on insurers who have not yet been included in the process can continue indefinitely – or at least until an arbitration has been completed to determine priority. In practice, insurers who are either paying benefits or who have been brought into a priority dispute and stand to be found responsible to pay benefits are very motivated to seek out other insurers who may be in higher priority to them. Generally speaking, insurers who may have SABS priority in a particular situation are identified and brought into the priority dispute process in plenty of time to be included in an arbitration.

It will be seen then that the interpretation of Regulation 283/95 is intended to promote its purpose - the identification of every insurer who it may be appropriate to

include in a priority dispute process and in an arbitration to determine priority, if necessary.

It is the giving and receipt of notice through service of NDBIs which is the essential step to involving a specific insurer in the priority dispute process, not the commencement of arbitration. The NDBI can be served on a specific insurer or insurers by the first tier insurer, or by any of the subsequent tier insurers, but every insurer does not have to receive an NDBI from every other insurer. Nor does every insurer have to commence arbitration against every other insurer.

It is notable that Regulation 283/95 allows for only one arbitration to determine priority for a SABS claim amongst the insurer paying benefits and every insurer who has received a NDBI (subsection 10 (3)). Since there can only be one arbitration there is only one limitation period for its commencement which begins from the date the first insurer paying benefits served the first NDBI and runs for one year (subsection 7(3).

It is clear from the way the arbitration provisions of Regulation 283/95 are structured, and specifically subsections 7 (1) and (2), that for arbitration to be validly commenced all that is necessary is for any of the insurer paying benefits, an insurer who has been served with an NDBI, or the claimant if they have given a notice of objection to serve a demand for arbitration on one other insurer who has received a NDBI within one year from the date of service of the first NDBI.

If this were not the case, then consider the situation where the insurer paying benefits serves a NDBI on a second insurer and makes a demand for arbitration to the second insurer well within one year. Unbeknownst to first insurer the second insurer

may have served a NDBI on a third insurer or may do so after receiving the first insurer's demand for arbitration. Is the first insurer's commencement of arbitration invalid because it only directed its demand for arbitration to the second insurer? In my opinion no, that is not the correct result. The first insurer has validly commenced arbitration in which all insurers who have up to that point received, or may thereafter receive NDBIs must participate to resolve the priority dispute. If that were not the case, it would be necessary for an insurer issuing a demand for arbitration to continually re-issue a demand to every insurer it becomes aware of or who is later added to the priority dispute by having received a NDBI. Not only would that be impractical, there is nothing in Regulation 283/95 which requires this to be done.

Consider also the situation where an insurer is identified and served a NDBI by a second or subsequent tier insurer more than a year after the first insurer served its first NDBI and a demand for arbitration had been issued by the first insurer within the year. It would be impossible for the first insurer to issue a valid demand for arbitration to this new insurer within the limitation period if the first insurer was required to name the new insurer in a NCA.

To recap, in my opinion the essential requirement to including a responding insurer in the priority dispute process is that they either be served with a NDBI by the first tier insurer within the 90 day period stipulated in section 3 of Regulation 283/95, or that they are served with an NDBI by a second or subsequent tier insurer at any time thereafter per section 10 of the Regulation.

Arbitration to determine the priority dispute is validly commenced as long as any of the first or subsequent tier insurers, or the insured who has served a notice of objection serves a demand for arbitration on any insurer who has been served with an NDBI, no later than one day after the first tier insurer served its first NDBI on one or more of the insurers. Every insurer who has been properly served with a NDBI relevant to the dispute is entitled to – and indeed required to participate in the one arbitration which has been so commenced.

Conclusion

The facts disclose that Dominion properly served both Aviva and Certas with a NDBI within the 90 days required by section 3 of Regulation 283/95. Dominion then satisfied the requirements of the Regulation by serving a demand for arbitration on Certas well within one year from the date Dominion had served its NDBIs on Aviva and Certas. By operation of section 10 of the Regulation this priority dispute must be dealt with in one arbitration which includes any insurer properly served with a NDBI. In this case both Aviva and Certas, as parties which have been properly served with NDBIs, are proper parties to the arbitration commenced by Dominion.

Aviva argued that if arbitration under the Regulation can be properly commenced without naming each insurer which has been served with a NDBI there is a risk that arbitrations could proceed in their absence and priority be determined to the prejudice of insurers who have not received a NCA naming them as respondents. While I concede that theoretically this could happen, I think it is highly unlikely since any insurer involved in the matter which has served a NDBI on another insurer will want to make sure that

said insurer is involved in arbitration to resolve priority whether or not that insurer has been named as a respondent in an NCA. In my opinion, the way the system is designed it is an extremely remote chance that a priority dispute would proceed through arbitration without the involvement of an insurer which one or more other insurers are aware of and believe could have a higher priority than them to pay SABS.

In any event, even if this is a risk of the manner in which the priority dispute process has been structured, the Regulation clearly does not require that every insurer which has received a NDBI be named as a respondent in a NCA for arbitration to be validly commenced. The drafters of the Regulation must not have seen this as a serious enough concern to require that every insurer which has received a NDBI be named in a NCA for arbitration to be validly commenced.

This case is a good example of the practical reality of how the system operates. Aviva was served with a NDBI within 90 days as required by the Regulation, but then there was no further communication between Dominion and Aviva for over a year. Even though Aviva was not included in the letter to Certas which constituted Dominion's demand for arbitration, once arbitration proceedings were underway to the point of retaining an arbitrator and pursuing the arbitration process, steps were taken to ensure Aviva was fully involved so that the priority issue can be determined with the participation of the necessary parties.

For the foregoing reasons, on the preliminary issue I conclude that Dominion has properly commenced arbitration in accordance with Regulation 283/95, and that both Aviva and Certas are proper parties to the arbitration.

Dominion as the successful party on the determination of this preliminary issue is entitled to its costs from Aviva and Certas. I encourage the parties to agree on costs. If they are unable to do so I direct as follows:

1) Dominion shall serve its Bill of Costs on Aviva and Certas, accompanied by written submissions within 15 days of the release of my decision on the preliminary issue.

2) Aviva and Certas shall serve their response on Dominion within 15 days thereafter.

3) Dominion shall serve its reply, if any, on Aviva and Certas within 10 days thereafter.

4) The parties' main written submissions shall be limited to 3, double-spaced pages (not including the Bill of Costs or copies of case law) with any reply by Dominion being limited to 2, double-spaced pages.

5) Counsel should provide the Arbitrator with their costs submissions concurrently with their service upon opposing counsel.

Whether or not the parties require my assistance with any costs issues, I invite them to contact me to schedule a pre-hearing conference so that we may discuss next steps for the remainder of the arbitration.

Dated at Toronto, November 18, 2019

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Scott W. Densem, Arbitrator